No. 357

No. 14884

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United States Court of Appeals

for the Ninth Circuit

COMMODITY CREDIT CORPORATION,
Appellant,

vs.

ROSENBERG BROS. & CO., INC., a Corporation,
Appellee,

and

ROSENBERG BROS. & CO., INC., a Corporation,
Appellant,

vs.

COMMODITY CREDIT CORPORATION,
Appellee.

Transcript of Record

In Two Volumes

Volume I

(Pages 1 to 332)

Appeals from the United States District Court for the Northern Disfrict of California, Southern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—1-27-56

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the United States District Court for the Northern District of California, Southern Division

Civil Action No. 30073

ROSENBERG BROS. & CO., INC.,

Plaintiff,

vs.

COMMODITY CREDIT CORPORATION,

Defendant.

COMPLAINT FOR DAMAGES FOR BREACH OF CONTRACT

Comes now Rosenberg Bros. & Co., Inc., and for a first cause of action alleges that:

I.

This is an action brought by a plaintiff engaged in business in the Northern District of California against Commodity Credit Corporation, a Federal corporation. Jurisdiction is vested in this Court over this cause by the Commodity Credit Corporation Charter Act, Act of June 29, 1948, 62 Stat. 1070, and more particularly by section 4 thereof; 15 U.S.C.A. sec. 714 b (c).

II.

Rosenberg Bros. & Co. was at all times hereinafter mentioned a corporation organized and existing under and by virtue of the laws of the State of California, engaged in the business, among other things, of processing and packing dried fruits and raisins.

III.

Plaintiff, Rosenberg Bros. & Co., Inc., is a corporation organized and existing under and by virtue of the laws of the State of Maryland, qualified to do and doing business in the State of California, with its principal office and place of business in the State of California, at 230 California Street, San Francisco. On October 21, 1948, said Maryland corporation succeeded to all of the assets and assumed all of the liabilities of said Rosenberg Bros. & Co., a California corporation, and continued the business theretofore conducted by Rosenberg Bros. & Co.

IV.

At all times hereinafter mentioned, Commodity Credit Corporation, hereinafter called "CCC" in order to distinguish it from the defendant, Commodity Credit Corporation, was a corporation organized and existing under and by virtue of the laws of the State of Delaware and was an agency of the United States Government and an instrumentality of and within the United States Department of Agriculture and particularly of the Production and Marketing Administration in said Department.

V.

The defendant, Commodity Credit Corporation, is a Federal corporation organized and existing under and by virtue of the Commodity Credit Corporation Charter Act, and is an agency and instrumentality of the United States, within the United States Department of Agriculture, and by the pro-

upon the estimated 1947 production of raisins and visions of said Commodity Credit Corporation Charter Act the duties and liabilities of CCC in respect to any contract or agreement or other obligation became the duties and liabilities of the defendant, Commodity Credit Corporation, and the enforceable claims against CCC became claims against and enforceable against the defendant, Commodity Credit Corporation.

VI.

Heretofore and on or about the 24th day of July, 1947, representatives of the raisin industry, working in conjunction with representatives of the United States Department of Agriculture and others, estimated that there would be a surplus of 100,000 tons of raisins for the 1947 crop year based this estimate was known to the United States Department of Agriculture, the Secretary of Agriculture and CCC.

VII.

Thereafter and with full knowledge of these facts and on or about the 5th day of September, 1947, the then Secretary of Agriculture announced a purchase program for the purchase of certain dried fruits, including raisins, by CCC, to provide outlets for the 1947 production, which announcement represented, among other things, that a maximum limit of 61,000 tons of 1947 crop raisins would be purchased, if purchase of this quantity became necessary, that purchases would be made from processors and packers, that an announcement would be issued

soon inviting packers to submit offers, that the program would not provide price support at any given level, and that the program should enable the industry to complete its plans for readjustment on a self-help basis. A copy of said announcement is annexed hereto, marked Exhibit "A," and by reference made a part hereof.

VIII.

Thereafter and on or about the 10th day of September, 1947, the United States Department of Agriculture issued Announcement No. 1, dated on that day, inviting offers to be submitted to Production and Marketing Administration, United States Department of Agriculture, Berkeley, California, for the sale to CCC of up to 30,000 tons of raisins, subject to acceptance by CCC, to implement the program set forth in the announcement of September 5, 1947, and in accordance with the announced terms thereof.

IX.

At the time of inviting such offers, the United States Department of Agriculture and CCC knew that the packers, including Rosenberg Bros. & Co., did not yet own the raisins to be offered, and knew that the raisins were still in the hands of producers.

X.

In response to Announcement No. 1 and in reliance upon the representations made in the announcement of September 5, 1947, setting forth the purchase program, Rosenberg Bros. & Co. there-

after offered in writing to sell raisins to CCC. On or about September 24, 1947, Production and Marketing Administration, United States Department of Agriculture, acting on behalf of CCC, by telegram from Berkeley, California, to Rosenberg Bros. & Co. at San Francisco entered into a contract with Rosenberg Bros. & Co., numbered A 6 Pm (Ff) 1647, whereby CCC agreed to purchase and Rosenberg Bros. & Co. agreed to sell twelve million (12,000,000) pounds of raisins at $.0755 per pound packed in domestic containers and eight million (8,000,000) pounds of raisins at $.0760 per pound packed in export containers, and whereby CCC promised not to purchase more than a total of 61,000 tons of 1947 crop raisins, promised not to establish support prices with respect to its purchases of 1947 crop raisins, and promised to make its purchases from packers and processors.

XI.

On or about the 24th day of September, 1947, the United States Department of Agriculture announced the purchase of 30,000 tons of raisins by CCC, including the tonnage purchased from Rosenberg Bros. & Co., and further announced that processors would be invited to submit bids on an additional 31,000 tons.

XII.

Thereafter and on or about the 1st day of October, 1947, the United States Department of Agriculture issued Announcement No. 2, dated on that day, inviting offers to be submitted to Production

and Marketing Administration, United States Department of Agriculture, Berkeley, California, by packers and processors, including Rosenberg Bros. & Co., for the sale to CCC of said 31,000 tons of raisins. This tonnage, together with tonnage already purchased as aforesaid, constituted the total maximum quantity of 61,000 tons set forth in the announcement of September 5, 1947, a copy of which is attached hereto as Exhibit "A."

XIII.

In response to Announcement No. 2 and in reliance upon the representations made in the said announcement of September 5, 1947, setting forth the purchase program, Rosenberg Bros. & Co. thereafter offered in writing to sell raisins to CCC. On October 13, 1947, Production and Marketing Administration, United States Department of Agriculture, acting on behalf of CCC, by night letter from Berkeley, California, dated on that day, to Rosenberg Bros. & Co. at San Francisco, California, and received by Rosenberg Bros. & Co. on the 14th day of October, 1947, entered into a contract with Rosenberg Bros. & Co., numbered A 6 Pm (Ef) 1893, whereby CCC agreed to purchase and Rosenberg Bros. & Co., agreed to sell eight million six hundred sixty thousand (8,660,000) pounds of raisins at $.0747 per pound, and whereby CCC promised not to purchase more than a total of 61,000 tons of 1947 crop raisins, promised not to establish support prices with respect to its purchases of 1947

crop raisins, and promised to make its purchases from packers and processors.

XIV.

Thereafter and on the 14th day of October, 1947, by announcement in writing dated on that day, the United States Department of Agriculture announced the purchase of 31,000 tons of raisins by CCC in addition to the 30,000 tons previously bought through September 25, 1947, and on the same day and in the same announcement and in violation of the terms of the contracts between CCC and Rosenberg Bros. & Co. alleged in paragraphs X and XIII hereof, the Department announced that producers and others in physical possession of raisins at the time they might submit their bids would be invited to offer immediately another 60,000 tons, making a total of 121,000 tons. A copy of said announcement of October 14, 1947, is attached hereto, marked Exhibit "B," and by reference made a part hereof.

XV.

Rosenberg Bros. & Co., upon learning of the said drastic change in the raisin program as evidenced by the said announcement of October 14, 1947, in violation of the terms of the aforesaid contracts, and on the same day, addressed a telegram to the Secretary of Agriculture requesting cancellation of the contracts numbered A 6 Pm (Ff) 1647 and A 6 Pm (Ff) 1893, which request was refused.

XVI.

Thereafter the United States Department of Agriculture and Commodity Credit Corporation imple-

mented the said announcement of October 14, 1947, for the purchase of additional raisins; they invited producers in physical possession of raisins to submit offers for the sale of raisins to CCC; they announced invitations to processors to submit offers to exchange packed, processed raisins for the natural condition raisins purchased by CCC from producers; they announced that persons other than producers in physical possession of raisins at the time of bidding might submit offers for the sale of packed, processed raisins; on or about the 26th day of November, 1947, they announced that in future purchases CCC would require processors to certify that they had paid producers not less than $135 per ton for natural condition raisins used in processing the packed, processed raisins offered to CCC all in violation of the contracts aforesaid theretofore entered into between CCC and Rosenberg Bros. & Co.

XVII.

Rosenberg Bros. & Co. performed all of the terms and conditions of said contracts on its part to be performed.

As and for a Second Cause of Action, plaintiff alleges that:

XVIII.

Plaintiff refers to paragraphs I, II, III, IV, V, VI, VII, VIII and IX of its first cause of action and realleges the same as if set forth herein at length.

XIX.

In response to Announcement No. 1 and in reliance upon the promises and representations made in the announcement of September 5, 1947, setting forth the purchase program, Rosenberg Bros. & Co. thereafter offered to sell raisins to CCC. On or about September 24, 1947, Production and Marketing Administration, United States Department of Agriculture, acting on behalf of CCC, by telegram from Berkeley, California, to Rosenberg Bros. & Co. at San Francisco entered into a contract with Rosenberg Bros. & Co., numbered A 6 Pm (Ff) 1647, whereby CCC agreed to purchase and Rosenberg Bros. & Co. agreed to sell twelve million (12,000,000) pounds of raisins at $.0755 per pound packed in domestic containers and eight million (8,000,000) pounds of raisins at $.0760 per pound packed in export containers, and whereby CCC promised not to hinder or interfere with Rosenberg Bros. & Co. in the performance of its said contracts with CCC and not to make such performance more difficult or expensive.

XX.

Plaintiff refers to paragraphs XI and XII of its first cause of action and realleges the same as if set forth herein at length.

XXI.

In response to Announcement No. 2 and in reliance upon the promises and representations made in the said announcement of September 5, 1947, setting forth the purchase program, Rosenberg

Bros. & Co. thereafter offered in writing to sell raisins to CCC. On October 13, 1947, Production and Marketing Administration, United States Department of Agriculture, acting on behalf of CCC, by night letter from Berkeley, California, dated on that day, to Rosenberg Bros. & Co. at San Francisco, California, and received by Rosenberg Bros. & Co. on the 14th day of October, 1947, entered into a contract with Rosenberg Bros. & Co., numbered A 6 Pm (Ff) 1893, whereby CCC agreed to purchase and Rosenberg Bros. & Co. agreed to sell eight million six hundred sixty thousand (8,660,000) pounds of raisins at $.0747 per pound, and whereby CCC promised not to hinder or interfere with Rosenberg Bros. & Co. in the performance of its said contracts with CCC and not to make such performance more difficult or expensive.

XXII.

Thereafter and on the 14th day of October, 1947, by announcement in writing dated on that day, the United States Department of Agriculture announced the purchase of 31,000 tons of raisins by CCC in addition to the 30,000 tons previously bought through September 25, 1947, and on the same day and in the same announcement the Department announced that producers and others in physical possession of raisins at the time they might submit their bids would be invited to offer immediately another 60,000 tons, making a total of 121,000 tons. A copy of said announcement of October 14, 1947,

is attached hereto, marked Exhibit "B," and by reference made a part hereof.

XXIII.

Thereafter the United States Department of Agriculture and Commodity Credit Corporation implemented the said announcement of October 14, 1947, for the purchase of additional raisins; they invited producers in physical possession of raisins to submit offers for the sale of raisins to CCC; they announced invitations to processors to submit offers to exchange packed, processed raisins for the natural condition raisins purchased by CCC from producers; they announced that persons other than producers in physical possession of raisins at the time of bidding might submit offers for the sale of packed, processed raisins; on or about the 26th day of November, 1947, they announced that in future purchases CCC would require processors to certify that they had paid producers not less than $135 per ton for natural condition raisins used in processing the packed, processed raisins offered to CCC all in violation of the contracts aforesaid heretofore entered into between CCC and Rosenberg Bros. & Co.

XXIV.

As a result of the actions of the United States Department of Agriculture and CCC as alleged in paragraphs XXII and XXIII (incorporating paragraph XVI of the first cause of action), raisin producers generally refused to sell raisins grown by them to processors and packers; and in view of

the announced intention of CCC to acquire substantial tonnages directly from producers rather than from processors and packers, producers demanded substantially higher prices than those theretofore prevailing, which demanded prices were so high that CCC itself refused all bids invited from producers in the period between October 14, 1947, and November 26, 1947. The November 26, 1947, announcement by CCC requiring certification by processors and packers of a minimum price of $135 per ton paid by them to producers, constituted in effect a support price and precluded purchase by processors of raisins from producers at less than $135 per ton. The prices at which CCC and Rosenberg Bros. & Co. contracted for the purchase and sale of raisins as aforesaid were such that CCC knew or should have known that Rosenberg Bros. & Co. could not pay a minimum of $135 per ton to producers without suffering substantial loss and damage. As a result of the foregoing, the performance by Rosenberg Bros. & Co. of its contracts with CCC was in fact substantially hindered, interfered with, and made more difficult and expensive, all to the loss and damage of Rosenberg Bros. & Co.

XXV.

Rosenberg Bros. & Co. performed all of the terms and conditions of said contracts on its part to be performed.

Wherefore, Plaintiff prays this Honorable Court that by reason of the breach by CCC of its con-

tracts with Rosenberg Bros. & Co. as hereinbefore set forth it have and recover judgment of and from defendant as follows:

1. For money damages in the amount of Five Hundred Seventy-three Thousand Two Hundred Dollars ($573,200):

2. For plaintiff's costs of suit herein incurred: and

3. And for such other and further relief as this Court shall deem meet and proper.

/s/ RICHARD E. GUGGENHIME,
HELLER, EHRMAN, WHITE
& McAULIFFE,

/s/ MELVILLE EHRLICH,
BELL AND EHRLICH,
Attorneys for Plaintiff.

EXHIBIT A

Secretary Anderson Announces Dried Fruit Purchase Program—(The following is the full text of an announcement made at Albuquerque, N.M., Sept. 5, 1947)—

Secretary of Agriculture Clinton P. Anderson announced that Commodity Credit Corporation will purchase up to 133,000 tons of dried apples, dried peaches, dried prunes and raisins if the purchase of

this total quantity of dried fruits is necessary to provide outlets for the relatively large 1947 production. The purchases will assist the industry in disposing of this expected surplus of supply and provide an excellent food for foreign relief feeding and school lunches.

The maximum limit of 133,000 tons is divided into purchase of 2,250 tons of dried apples, 3,750 tons of dried peaches, 61,000 tons of raisins, and 66,000 tons of dried prunes.

Purchases of the dried fruits under the program will be made from processors and packers of dried fruits. An announcement will be issued soon inviting packers to submit offers on a portion of the quantity to be purchased.

Most of the prunes procured by the Commodity Credit Corporation will be of the 70/80, 80/90, and 90/100 sizes. Raisin purchases will be confined to the Thompson Seedless variety.

The purchase program does not provide price support at any given level, but is expected to result in reasonable prices to producers and consumers.

Department officials stated that the program should enable the dried fruit industry to complete its plans for readjustment on a self-help basis. It was emphasized that Government purchases should not be regarded as the permanent solution of dried fruit surplus problems.

EXHIBIT B

United States Department of Agriculture
Production and Marketing Administration

Washington, October 14, 1947.

Dried Fruit Purchases Announced:

The U. S. Department of Agriculture announced today that the Commodity Credit Corporation has bought an additional 31,000 tons of Thompson Seedless raisins, and that producers and others in physical possession of raisins at the time they submit their bids will be invited to offer immediately another 60,000 tons.

The 31,000 tons announced today is in addition to 30,000 tons previously bought through September 25. Purchases made to date and to be made (totaling 121,000 tons) are designed to conserve valuable food and to yield reasonable prices to producers and consumers.

The total of 121,000 tons constitutes the total indicated surplus of raisins at the present time. These purchases will leave for domestic consumers a supply that will meet all demands at materially lower prices for this year's pack than for the 1946 pack.

The 31,000 tons announced today were bought at prices ranging up to $149.40 per ton.

The CCC has also bought an additional 20,318 tons of dried prunes, consisting largely of sizes

90/100, 80/90, and 70/80 at prices up to $168.40, $181.60, and $190 per ton, respectively. These purchases of dried prunes are in addition to 26,500 tons previously purchased through September 25.

The CCC has also bought an additional 2,664 tons of dried peaches, containing a larger than average proportion of small sizes, at prices ranging up to $244.80 per ton. These purchases of dried peaches are in addition to 1,086 tons bought through September 25. On September 25 the Department had also announced the purchase of 1,000 tons of dried apples at an average price of about $250 per ton.

A grand total of 112,568 tons of all dried fruits has been purchased from processors and packers to date since offers to purchase were originally announced by the Department on September 5. It was stated at that time that the proposed purchases would assist the industry in disposing of the expected surplus of supply and provide an excellent food for foreign relief feeding and school lunches.

Duly verified.

[Endorsed]: Filed October 11, 1950.

[Title of District Court and Cause.]

ANSWER

The defendant, by Chauncey F. Tramutolo, United States Attorney, answers the complaint as follows:

As to the First Cause of Action

1. Defendant admits the allegations contained in paragraph I of the complaint, except that defendant denies that this Court has jurisdiction over the causes of action alleged in the complaint, as hereinafter more fully set forth in the Fourth Affirmative Defense.

2. Defendant denies that it has knowledge or information sufficient to form a belief as to the allegations contained in paragraph II of the complaint.

3. Defendant denies that it has knowledge or information sufficient to form a belief as to the allegations contained in paragraph III of the complaint.

4. Defendant admits the allegations contained in paragraph IV of the complaint except that it denies that Commodity Credit Corporation was an instrumentality of Production and Marketing Administration. Defendant admits that Commodity Credit Corporation carried out its programs through Production and Marketing Administration.

5. Defendant admits the allegations contained in paragraph V of the complaint.

6. Defendant denies the allegations contained in paragraph VI of the complaint. Defendant admits that a representative of the Department of Agriculture working in conjunction with others, including representatives of the raisin industry, unofficially and informally estimated that there would be a surplus of approximately 100,000 tons of raisins for the 1947 crop year. On or about July 24, 1947, and September 5, 1947, officials of the Department of Agriculture and of Commodity Credit Corporation did not know for certain the full extent of the raisin surplus for the year 1947. Moreover, the experience of prior years showed substantial variations between estimates of surplus and true or actual surplus.

7. Defendant denies the allegations contained in paragraph VII of the complaint. Defendant admits the issuance of a press release dated September 5, 1947, by the Secretary of Agriculture which is attached to the complaint and marked Exhibit "A." The said press release was not intended to create private contractual or vested rights, and it created no such rights. It contained no representations of a contractual nature. It was a declaration of policy only.

8. Defendant denies the allegations contained in paragraph VIII of the complaint. Defendant admits that on September 10, 1947, Announcement No. 1 was issued by the Department of Agriculture. It contained no representations whatsoever of any kind or character. It was an invitation to proc-

essors to make offers for the sale of raisins. A copy of the announcement is attached and marked Exhibit 1.

9. Defendant denies the allegations contained in paragraph IX of the complaint.

10. Defendant denies the allegations contained in paragraph X of the complaint. Defendant admits that pursuant to Announcement No. 1, hereinabove mentioned in paragraph 8 hereof, and on September 17, 1947, Rosenberg Bros. and Co., hereinafter referred to as Rosenberg, offered to sell to defendant 20,000,000 pounds of raisins. The offer was accepted by the defendant on September 23, 1947. Copies of the aforesaid offer and acceptance, which became contract No. 1647, are annexed hereto and marked Exhibit "2."

11. Defendant admits the allegations contained in paragraph XI of the complaint and annexes herewith the Press Release issued on September 24, 1947, marked Exhibit "3."

12. Defendant denies the allegations contained in paragraph XII of the complaint. Defendant admits that on October 1, 1947, Announcement No. 2 was issued by the Department of Agriculture. It contained no representations whatsoever of any kind or character. It was an invitation to processors to make offers for the sale of raisins. A copy of the announcement is herewith attached and marked Exhibit "4."

13. Defendant denies the allegations contained in paragraph XIII of the complaint. Defendant admits that Rosenberg made an offer, dated October 8, 1947, to sell raisins to the defendant, pursuant to the aforementioned announcement No. 2 referred to in paragraph 12 hereof, and that on October 13, 1947, defendant accepted the offer to sell 8,660,000 pounds of raisins. Copies of the aforesaid offer and acceptance which became contract No. 1893 are annexed herewith and marked Exhibit "5."

14. Defendant denies the allegations contained in paragraph XIV of the complaint. Defendant admits that on October 14, 1947, the Department of Agriculture issued a press release announcing that by reason of the then total indicated surplus of 121,000 tons of raisins, the Department of Agriculture would purchase an additional 60,000 tons of raisins. A copy of the press release is attached to the complaint and marked Exhibit B.

15. Defendant denies the allegations contained in paragraph XV of the complaint. Defendant admits that on October 14, 1947, Rosenberg requested cancellation of the raisin contracts numbers 1647 and 1893. The Secretary of Agriculture by telegram of November 6, 1947, informed Rosenberg that he was unable to grant its request for cancellation. A copy of the telegram is attached and marked Exhibit "6."

16. Defendant denies the allegations contained in paragraph XVI of the complaint. Defendant admits that announcements were made by the Depart-

ment of Agriculture which were generally to the effect set forth in paragraph XVI of the complaint, except that the defendant denies that the aforesaid announcements were in violation of the contracts which had been entered into between Commodity Credit Corporation and Rosenberg.

17. Defendant denies the allegations contained in paragraph XVII of the complaint.

As to the Second Cause of Action

18. Defendant realleges, as if fully set forth herein, the admissions and denials contained in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, and 9 of the answer.

19. Defendant denies the allegations contained in paragraph XIX of the complaint. The defendant admits that it entered into contract No. 1647 with Rosenberg. For the full and express terms of the contract, defendant refers to Exhibit 2 attached hereto.

20. Defendant repeats and realleges, as fully set forth herein, the denials and admissions contained in paragraphs 11 and 12 of the answer.

21. Defendant denies the allegations contained in paragraphs XXI of the complaint, except that defendant admits that it entered into contract No. 1893 with Rosenberg, as hereinabove set forth in paragraph 13.

22. Defendant admits the allegations contained in paragraph XXII of the complaint and states that on October 14, 1947, it issued a press release

copy of which is attached to complaint, and marked Exhibit B.

23. Defendant denies the allegations contained in paragraph XXIII of the complaint. Defendant admits that announcements were made by the Department of Agriculture which were generally to the effect set forth in paragraph XXIII of the complaint, except that the defendant denies that the aforesaid announcements were in violation of the contracts which had been entered into between Commodity Credit Corporation and Rosenberg.

24. Defendant denies the allegations contained in paragraph XXIV of the complaint. Defendant admits that the Department of Agriculture issued an announcement, dated November 26, 1947, which is annexed hereto and marked Exhibit "7."

25. Defendant denies the allegations contained in paragraph XXV of the complaint.

For a First Affirmative Defense

26. The plaintiff has failed to state a cause of action, by reason of the fact that the contracts entered into between Rosenberg and the defendant resulted in no contractual promise or other guarantee to Rosenberg except that defendant agreed to buy and Rosenberg agreed to sell the quantities of raisins stated in those contracts at the prices stated therein.

For a Second Affirmative Defense

27. The purchases of raisins announced by the Department of Agriculture were part of the pur-

chase program undertaken by the Government in the exercise of its sovereign powers in accordance with the provisions of Section 4(b) of the Act of July 1, 1941, as amended 15 U.S.C. 713a-8(b). The purchases of raisins were made by the Department as part of the public and general acts of the sovereign.

For a Third Affirmative Defense

28. Rosenberg defaulted in making delivery under its contracts with the defendant. Following such default Rosenberg requested cancellation of the contracts which was refused. Thereafter defendant requested Rosenberg to make delivery of the raisins, with the understanding that no damages for late delivery would be claimed by defendant, and no carrying charges would be claimed by Rosenberg.

29. Rosenberg acceded to such request, without protest or reservation of any kind, and delivered the raisins which it had contracted to sell, as aforesaid, pursuant to such new agreement. By making such delivery, Rosenberg waived its claim or claims for damages, if any, for the alleged breach of its contracts with defendant.

30. Rosenberg's waiver was with full knowledge of the controversy which existed, and it received payment in full, under the new contract, for the raisins so delivered, without protest or reservation.

For a Fourth Affirmative Defense

31. (a) The sole purpose of this suit by the plaintiff is to collect money from the Government

for alleged breach of asserted representations in a program announced by the Secretary of Agriculture in furtherance of governmental policies and not on an expressly assumed corporate obligation of Commodity Credit Corporation. Any judgment obtained against defendant would have to be satisfied from the Treasury of the United States.

(b) This action is, therefore, in substance an action against the United States of America, which has not waived its immunity from suit, nor consented to be sued, nor permitted Commodity Credit Corporation to stand in judgment on its behalf save in contract on corporate obligations voluntarily assumed.

(c) The United States of America is an indispensable party and cannot be made a party, it not having waived its immunity from suit nor consented to be sued.

For a Fifth Affirmative Defense

32. Plaintiff's causes of action appear to be grounded in estoppel. The doctrine of estoppel may not be used as a basis for collecting damages from the United States or its agencies.

For a Sixth Affirmative Defense

33. Defendant entered into two written contracts with Rosenberg. They are set forth in paragraphs 10 and 13 of the answer. For the complete embodiment and the precise terms of the contractual rights and obligations between Rosenberg Bros. & Co.

and the defendant, reference is made to Exhibits 2 and 5 hereto annexed.

Wherefore, defendant demands judgment dismissing the complaint, with costs.

/s/ HOLMES BALDRIDGE,
Assistant Attorney General.

/s/ CHAUNCEY F. TRAMUTOLO,
United States Attorney.

By /s/EDGAR R. BONSALL,
Assistant U. S. Attorney.

Of Counsel:

/s/ HERMAN WOLKINSON,
Attorney, Department of Justice.

EXHIBIT 1

United States Department of Agriculture
Production and Marketing Administration
Fruit and Vegetable Branch
P. O. Box 773
Berkeley 1, California

ANNOUNCEMENT No. 1

September 10, 1947.

Packed Processed Dried Apples, Dried Peaches, Dried Prunes and Raisins

The United States Department of Agriculture announces that purchases by Commodity Credit

Corporation of the following specified packed processed dried fruits are contemplated and offers for the sale of these commodities may now be submitted: 1,000 tons dried apples; 2,000 tons dried peaches and up to 30,000 tons each of prunes and raisins. Offers involving prunes of 50/60, 60/70, 70/80, 80/90 and 90/100 sizes and Natural or Sun Dried Thompson Seedless Raisins may be submitted.

Each offer shall be submitted in an original and four (4) signed legible copies on the attached form, and shall be addressed to: Western Marketing Field Office, Production and Marketing Administration, P. O. Box 773, Berkeley 1, California, to be received on or before 5:00 p.m., P.S.T., September 17, 1947. Such offers shall be subject to acceptance by the Commodity Credit Corporation in whole or in part by telegram or letter filed at Berkeley, California, not later than midnight of September 22, 1947. Offers shall be submitted for not less than minimum carlots.

Offers shall be for delivery during the period October 1, 1947, to December 15, 1947, as specified by Commodity Credit Corporation.

Further details with respect to this purchase may be obtained by communicating with R. M. Walker, Chief, Western Marketing Field Office, Production and Marketing Administration, P. O. Box 773, Berkeley, California; Telephone AShberry 3-8268 and AShberry 3-8269. All inquiries concerning shipment should be directed to the Shipping and Stor-

age Branch, Production and Marketing Administration, United States Department of Agriculture, 615 Pacific Building, 821 Market Street, San Francisco 3, California; Telephone EXbrook 2-8381.

s/ R. M. WALKER.

R. M. WALKER,
Chief, Western Marketing
Field Office.

Attachments

EXHIBIT H

Western Union Telegram

Night Letter

Berkeley, California.

September 23, 1947.

Rosenberg Brothers & Co.
230 California Street
San Francisco, California

Your offer to sell Commodity Credit Corporation packed processed raisins pursuant to announcement No. 1 dated September 10, 1947, is hereby accepted as follows, subject to your agreeing to extend the time for acceptance by CCC from midnight September 22, 1947, to midnight September 24, 1947. Please confirm by telegram. Confirmation should be filed not later than 5 p.m. September 24.

Lot No. One 12,000,000 pounds F.O.B. Fresno grade C, custom size, price .0755, container D, 30# net.

Lot No. One 8,000,000 pounds F.O.B. Fresno grade C, custom size, price .0760, container C, 30# net.

R. M. WALKER,
Contract Officer, Commodity Credit Corporation.

Certified true copy.

/s/ BENJ. C. YOUNG,
Marketing Specialist.

[Stamped]: Received Oct. 28, 1947.

ORIGINAL

UNITED STATES DEPARTMENT OF AGRICULTURE
PRODUCTION AND MARKETING ADMINISTRATION
Fruit and Vegetable Branch
P. O. Box 773
Berkeley 1, California

Rev

PACKED PROCESSED NATURAL THOMPSON SEEDLESS RAISINS - OFFER OF SALE
ANNOUNCEMENT NO. 1
DRIED FRUIT PRICE SUPPORT PROGRAM
OC-95a

This Space for CCC Use Only — Contract A6pm(Ff)- 1647 — Contract Date September 24, 1947

TO: COMMODITY CREDIT CORPORATION (CCC)

The undersigned (hereinafter referred to as "contractor") hereby offers to sell to Commodity Credit Corporation (hereinafter referred to as CCC) packed processed natural Thompson seedless raisins subject to the terms and conditions set forth in "Standard Contract Conditions" (Form PMA-100), which is incorporated herein by reference and is made a part hereof, except Articles 1(a) and (b), 6, 8, 9, 10, 13, 16, and 21, which do not apply; and in accordance with the following:

1. Quantity, Shipping Point, Grade, Container Type, Price: All or any part of the following lots f.o.b. cars or trucks at option of CCC at the shipping points shown, to be ready for delivery during the period beginning October 1, 1947 and ending December 15, 1947.

Lot No.	Quantity (pounds)	Shipping Point & R.R. Serving	Grade	Net Wt. of Pkg.	Price per Pound In Containers Specified (See Par. 4) (a)	(b)	(c)	(d)
1	12,000,000 20,000,000 8,000,000	Fresno SP AT&SF	C Custom size	30#			$0.0760	$0.0755
2								
3								
4								
5								

(Use continuation sheet for additional lots)

2. Carrying charge rate $3.00 per ton per 30 day month-fractional part thereof proportionately. (See Paragraph 8 following).

3. Quality: U. S. Grade C or better as defined in "United States Standards for Grades of Processed Raisins" effective October 15, 1946.

4. Containers:

(a) W5c: Raisins shall be packed 25 to 30 pounds bulk in W5c fiberboard containers, meeting the requirements set forth in "Export Packaging Specifications" Form PMA-138, dated April 15, 1946. Or,

(b) W5s: Raisins shall be packed 25 to 30 pounds bulk in W5s fiberboard containers, meeting the requirements set forth in "Export Packaging Specifications" Form PMA-138, dated April 15, 1946. Or,

Exhibit II

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(c) Industry Export: Raisins shall be packed 25 or 30 pounds bulk in containers of the following specifications: (1) Solid fibre. Size 15 1/4 x 11 x 5 3/4 or 6 3/4 caliper .060 with a double double collar made of 023-009-023-009-023 corrugating with top and bottom pads. Or, (2) Corrugated fibre. Size 15 1/4 x 11 x 5 3/4 or 6 3/4, 200 pound test box with double double collar made of 016-009-016-009-016 with top and bottom pads.

(d) Industry Domestic: Raisins shall be packed 25 or 30 pounds bulk in containers of the following specifications: (1) Solid fibre. Size and constructions same as for (c), (Industry Export), with double faced collar made of 023-009-023 corrugating with top and bottom pads. Or, (2) Corrugated fibre. Size and construction same as for (c), (Industry Export), with double faced collar made of 016-009-016 corrugating with top and bottom pads.

5. Markings: Each case shall be marked on one end as follows: Name of commodity, contents, contractor's name and address, contract number, lot number, gross and net weight, and such other markings as indicated in the Notice to Deliver from CCC.

6. Inspection and Checkloading: It is understood and agreed that such raisins will be inspected and checkloaded by representatives of the Processed Products Standardization and Inspection Division, Fruit and Vegetable Branch, Production and Marketing Administration, United States Department of Agriculture, and that the costs of such services and of issuing certificates will be borne by the contractor. Samples will be furnished by the contractor without cost to CCC.

7. Delivery: CCC shall institute a Notice to Deliver calling for delivery within the period specified in Paragraph "1" hereof. Delivery shall be made at the shipping point and during the period specified in the Notice to Deliver. It shall be incumbent upon the contractor to make arrangements to obtain inspection certificates within time to make deliveries as provided.

8. Carrying Charge: If CCC fails to issue the Notice to Deliver for delivery on or before December 15, 1947, the contractor shall be entitled to carrying charges ~~and~~ but full ~~time~~ compensation for delayed delivery at the rate specified in Paragraph "1" above, such carrying charges to accrue beginning with the 16th day of December and ending on the day preceding the actual date of delivery, both dates inclusive.

9. Officials not to Benefit: No Member of or Delegate to Congress or Resident Commissioner, shall be admitted to any share or part of the contract or to any benefit that may arise therefrom, but this provision shall not be construed to extend to a contract made with a corporation for its general benefit, nor shall it extend to a contract of a kind which the Secretary of Agriculture may enter into with farmers.

Exhibit II

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25 (3)

10. This offer as set forth above may be accepted in whole or in part by letter or telegram filed at Berkeley, California not later than midnight P.S.T. September 22, 1947.

IN WITNESS WHEREOF, The undersigned has executed this offer this 17th day of September, 1947.

Name of Firm ROSENBERG BROS. & CO.

By Arthur L. Rosenheimer, II

Title Vice President

Type of Firm Corporation
(Corporation, Partnership, Individual, etc.)

Full address 230 California Street, San Francisco, California

Address of Invoicing Office: Same as above.

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Exhibit II

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EXHIBIT III

United States Department of Agriculture
Production and Marketing Administration

Washington, September 25, 1947.

USDA Announces Dried Fruit Purchase:

The U. S. Department of Agriculture announced today the purchase by Commodity Credit Corporation of 59,450 tons of dried fruit from California processors under the program announced by the Department September 5, 1947. The Department also announced that processors are being invited to submit offers on an additional 15,000 tons of dried prunes, 31,000 tons of raisins, and 1,750 tons of dried peaches.

The purchase announced today included 26,450 tons of dried prunes, consisting largely of sizes 90/100, 80/90, and 70/80, at prices up to $160, $170, and $180 per ton respectively; 30,000 tons of Thompson Seedless raisins at prices ranging up to $162 per ton; 2,000 tons of dried peaches, containing a larger than average proportion of small sizes, at prices ranging up to $239 per ton; and 1,000 tons of dried apples at an average price of about $250 per ton. In its initial offer to purchase, the Department invited bids on 30,000 tons of prunes but was able to obtain confirmed offers on only 26,450 tons.

EXHIBIT IV

United States Department of Agriculture
Production and Marketing Administration
Fruit and Vegetable Branch
P. O. Box 773
Berkeley 1, California

Announcement No. 2

October 1, 1947.

Packed Processed Dried Peaches,
Dried Prunes and Raisins

The United States Department of Agriculture announces that purchases by Commodity Credit Corporation of the following specified packed processed dried fruits are contemplated and offers for the sale of those commodities may now be submitted by only packers and processors of these dried fruits: 2,670 tons dried peaches, 15,000 tons of prunes and 31,000 tons of raisins. Offers involving prunes of 50/60, 60/70, 70/80, 80/90 and 90/100 sizes and Natural or Sun Dried Thompson Seedless Raisins may be submitted.

Each offer shall be submitted in an original and five (5) signed legible copies on the attached form, and shall be addressed to: Western Marketing Field Office, Production and Marketing Administration P. O. Box 773, Berkeley 1, California, to be received on or before 5:00 p.m., P.S.T., October 8, 1947. Such offers shall be subject to acceptance by the Com-

modity Credit Corporation in whole or in part by telegram, or letter filed at Berkeley, California, not later than midnight of October 16, 1947. Offers shall be submitted for not less than minimum carlots.

Offers shall be for delivery during the period October 20, 1947, to January 20, 1948, as specified by Commodity Credit Corporation.

Further details with respect to this purchase may be obtained by communicating with R. M. Walker, Chief, Western Marketing Field Office, Production and Marketing Administration, P. O. Box 773, Berkeley, California; Telephone Ashberry 3-8268 and Ashberry 3-8269. All inquiries concerning shipment should be directed to the Shipping and Storage Branch, Production and Marketing Administration, United States Department of Agriculture, 615 Pacific Building, 821 Market Street, San Francisco 3, California; Telephone EXbrook 2-8381.

/s/ R. M. WALKER,

R. M. WALKER,
Chief, Western Marketing
Field Office.

Attachments

EXHIBIT V

Finance and Accounts

Berkeley, Calif.
10/13/47

Night Letter

Rosenberg Bros. & Co.
230 California St.
San Francisco, Calif.

Your offer to sell Commodity Credit Corporation packed processed raisins pursuant to announcement No. 2 dated October 1, 1947, accepted as follows: Lot One, 8,660,000 pounds, FOB Fresno, grade C or better, $.0747 per pound, container 30 pounds net weight type A2. All other conditions specified in offer will apply. Your contract number is A6PM-(FF)1895.

R. M. WALKER.

Certified True Copy.

/s/ BENJ. C. YOUNG,
Market Specialist.

[Stamped]: Received Nov. 5, 1947.

ORIGINAL

UNITED STATES DEPARTMENT OF AGRICULTURE
PRODUCTION AND MARKETING ADMINISTRATION
Fruit and Vegetable Branch
P. O. Box 773
Berkeley 1, California

PACKED PROCESSED NATURAL THOMPSON SEEDLESS RAISINS - OFFER OF SALE
ANNOUNCEMENT NO. 2
DRIED FRUIT PRICE SUPPORT PROGRAM
OC-95a

This Space for CCC Use Only — Contract A6pm(Ff) 1893 — Contract Date October 13, 1947

TO: COMMODITY CREDIT CORPORATION (CCC)

The undersigned being a packer and processor of Natural Thompson Seedless Raisins (hereinafter referred to as "contractor") hereby offers to sell to Commodity Credit Corporation (hereinafter referred to as CCC) packed processed Natural Thompson Seedless Raisins subject to the terms and conditions set forth in "Standard Contract Conditions" (Form PMA-100), which is incorporated herein by reference and is made a part hereof, except Articles 1(a) and (b), 6, 8, 9, 10, 13, 16, and 21, which do not apply; and in accordance with the following:

1. Quantity, Shipping Point, Grade, Container Type, Price: All or any part of the following lots f.o.b. cars or trucks at option of CCC at the shipping points shown, to be ready for delivery during the period beginning October 20, 1947 and ending January 20, 1948.

Lot No.	Quantity (pounds)	Shipping Point & R.R.Serving	Grade	Net Wt. of Pkg.	Price per Pound Designate Container (See Par. 4) ( )	(A-2)	(B-2)
1	10,000,000	Fresno SP	C Custom size	30#		$.0747	$.0742
2	10,000,000	AT&SF	C ustom size	30#		$.0773	$.0768
3							
4							
5							

4,000,000 (Use continuation sheet for additional lots)

2. Carrying charge rate $1.00 per ton per 30 day month-fractional part thereof proportionately. (See Paragraph 8 following).

3. Quality: U. S. Grade C or better as defined in "United States Standards for Grades of Processed Raisins" effective October 15, 1946.

4. Containers:

Note: Quote prices for processed Natural Thompson Seedless Raisins for both industry export and industry domestic packed in containers described below. (Designate the container by inserting the appropriate symbol in the space provided.)

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Industry Export.

Raisins shall be packed 25 or 30 pounds bulk in containers of the following specifications:

Symbol (A 1) Solid fibre. Size 15 1/4 x 11 x 5 3/4 or 6 3/4 caliper .060 with a double double collar made of 025-009-023-009-023 corrugating with top and bottom pads.

Symbol (A 2) Corrugated fibre. Size 15 1/4 x 11 x 5 3/4 or 6 3/4, 200 pound test box with double double collar made of 016-009-016-009-016 with top and bottom pads.

Industry Domestic.

Raisins shall be packed 25 or 50 pounds bulk in containers of the following specifications:

Symbol(B 1) Solid fibre. Size and construction same as for (A 1), (Industry Export) with double faced collar made of 023-009-023 corrugating with top and bottom pads.

Symbol (B 2) Corrugated fibre. Size and construction same as for (A 2), (Industry Export), with double faced collar made of 016-009-016 corrugating with top and bottom pads.

5. Markings: Each case shall be marked on one end as follows: Name of commodity, contents, contractor's name and address, contract number, lot number, gross and net weight, and such other markings as indicated in the Notice to Deliver from CCC.

6. Inspection and Checkloading: It is understood and agreed that such raisins will be inspected and checkloaded by representatives of the Processed Products Standardization and Inspection Division, Fruit and Vegetable Branch, Production and Marketing Administration, United States Department of Agriculture, and that the costs of such services and of issuing certificates will be borne by the contractor. Samples will be furnished by the contractor without cost to CCC.

7. Delivery: CCC shall institute a Notice to Deliver calling for delivery within the period specified in Paragraph "1" hereof. Delivery shall be made at the shipping point and during the period specified in the Notice to Deliver. It shall be incumbent upon the contractor to make arrangements to obtain inspection certificates within time to make deliveries as provided.

8. Carrying Charge: If CCC fails to issue the Notice to Deliver for delivery on or before January 20, 1948, the contractor shall be entitled to carrying charges in full compensation for delayed delivery at the rate specified in Paragraph "1" above, such carrying charges to accrue beginning with the 21st day of January and ending on the day preceding the actual date of delivery, both dates inclusive.

Officials not To Benefit: No Member of or Delegate to Congress or Resident Commissioner, shall be admitted to any share or part of the contract or to any benefit that may arise therefrom, but this provision shall not be construed to extend to a contract made with a corporation for its general benefit, nor shall it extend to a contract of a kind which the Secretary of Agriculture may enter into hereafter.

This offer as set forth above may be accepted in whole or in part by letter or telegram mailed, telegraphed, or delivered at San Francisco, California not later than midnight P.S.T. October 16, 1942.

Witness my hand, the undersigned has executed this offer this 8th day of October 1942.

Name of Firm: ROSENBERG BROS. & CO.

By: E. N. Rosenberg

Title: Assistant to President

Type of Firm: Corporation
(Corporation, Partnership, Individual, etc.)

Address: 230 California Street, San Francisco 6, California

Address of Invoicing Office: Same as above.

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EXHIBIT VI

(Copy)

U. S. Department of Agriculture
PMA-Fruit & Vegetable Branch

8-6-105

November 6, 1947.

D/L

Dwight K. Grady
Rosenberg Bros. & Company
230 California Street
San Francisco, California

Thanks urtel relative raisin purchase program. Objective this program is and has been to remove raisin surplus and permit remainder of supply flow in normal commercial trade channels at prices established by the industry. Announcement and offer forms for use producers and others in making offers on additional 60,000 tons now being distributed. Believe it advisable await return of offers before determining whether purchase program should be changed. Unable grant your request for cancellation of raisin purchase contract between your firm and Commodity Credit Corporation.

/s/ CLINTON P. ANDERSON,
Secretary.

PMA-F&V
EMGraham:LMS
11/5/47
Raisins

EXHIBIT VII

United States Department of Agriculture
Production and Marketing Administration

Washington, November 26, 1947.

USDA Announces Additional Raisin Purchases:

The Department of Agriculture announced today that under the purchase program announced October 17, the Commodity Credit Corporation has purchased 19,541 tons of Thompson Seedless Raisins in packed processed form at prices averaging $171.46 per ton.

The purchase was made by the acceptance of offers from both producers and processors.

The Department also announced that in future purchases CCC will require processors to certify that they have paid producers not less than $135 per ton for the natural condition raisins used in processing the quantity of packed processed raisins offered to CCC. Any processor who is also a grower cooperative marketing association will be required to certify that at least $135 per ton of natural condition raisins used in processing the raisins sold to CCC will be credited to growers' pool accounts. Processors will be invited next week to submit offers under the new terms on additional packed processed Thompson Seedless raisins, in furtherance to the Department's objective to remove the surplus.

Producers' offers of natural condition raisins which were submitted and considered by CCC today were not accepted. All such offers included prices in excess of $135 per ton. This action made it necessary for CCC to reject processors' offers to exchange packed processed raisins for natural condition raisins.

The 19,541 tons of Thompson Seedless raisins purchased today brings the total of such purchases by CCC to 80,541 tons during the current season.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 1, 1951.

[Title of District Court and Cause.]

NOTICE OF MOTION TO STRIKE CERTAIN AFFIRMATIVE DEFENSES FROM DEFENDANT'S ANSWER

To Commodity Credit Corporation, defendant above named, and to Holmes Baldridge, Esq., Assistant Attorney General; Chauncey Tramutolo, Esq., U. S. Attorney, and Herman Wolkinson, Esq., Attorney, Department of Justice, its attorneys:

Please Take Notice that, upon the pleadings, papers and records of file herein, the plaintiff, by its attorneys Richard E. Guggenhime, Esq., Messrs. Heller, Ehrman, White & McAuliffe, Melville Ehrlich, Esq. and Messrs. Bell and Ehrlich, will move

the above-entitled Court, at the Post Office Building, Seventh and Mission Streets, City and County of San Francisco, State of California, on the 17th day of September, 1951, at 10:00 o'clock a.m., or as soon thereafter as counsel can be heard, pursuant to the motion, a copy of which is hereto attached, made a part hereof, and served herewith, for an order striking certain affirmative defenses from defendant's answer on the ground that said defenses are insufficient in law as defenses to the causes of action or either cause of action set forth in the complaint on file herein.

/s/ RICHARD E. GUGGENHIME,
HELLER, EHRMAN, WHITE
& McAULIFFE,

/s/ MELVILLE EHRLICH,
BELL and EHRLICH,
Attorneys for Plaintiff.

[Title of District Court and Cause.]

MOTION TO STRIKE CERTAIN AFFIRMATIVE DEFENSES FROM DEFENDANT'S ANSWER

Comes now Rosenberg Bros. & Co., Inc., plaintiff in the above-entitled cause, by its attorneys, Richard E. Guggenhime, Esq., Messrs. Heller, Ehrman, White & McAuliffe, Melville Ehrlich, Esq., and

Messrs. Bell and Ehrlich, and moves this Honorable Court to strike out, all and singular, the affirmative defenses set up in the following paragraphs of the answer of defendant herein filed on the 1st day of August, 1951:

1. First Affirmative Defense, paragraph 26;
2. Second Affirmative Defense, paragraph 27;
3. Third Affirmative Defense, paragraphs 28, 29 and 30;
4. Fourth Affirmative Defense, paragraph 31;
5. Fifth Affirmative Defense, paragraph 32;
6. Sixth Affirmative Defense, paragraph 33.

This motion is made up on the ground that the affirmative defenses set forth in the foregoing paragraphs of said answer are, all and singular, insufficient as defenses to the causes of action, or either cause of action, set forth in the complaint on file in this cause.

/s/ RICHARD E. GUGGENHIME,
HELLER, EHRMAN, WHITE
& McAULIFFE,

/s/ MELVILLE EHRLICH,
BELL and EHRLICH,
Attorneys for Plaintiff.

[Endorsed]: Filed August 21, 1951.

[Title of District Court and Cause.]

ORDER

Plaintiff has moved, under Rule 12(f) of the Federal Rules of Civil Procedure, to strike from defendant's answer allegations which purport to set up six affirmative defenses. This motion is grounded upon the assertion that such allegations are, as a matter of law, insufficient defenses to plaintiff's action, as set forth in its complaint.

"Motions to strike out are not to be freely granted * * *, and no deletions will be made unless it is clear that the allegations are without the issues * * *. Moreover, the movant should show that he will be prejudiced if the attacked allegations are left in the pleadings. * * * Finally, a motion to strike a defense will be denied if the defense presents a bona fide question of law or fact which should be heard on its merits. * * *" American Machine & Metals, Inc. vs. De Bothezat Impeller Co., S.D. N.Y., 8 F.R.D. 306, 308. "If the allegations attacked are such that under some contingency they may raise relevant issues, they will not be stricken. * * *" Forstmann Woolen Co. vs. Murray Sicos Corp., S.D.N.Y., 10 F.R.D. 367, 369.

The disputed allegations of the answer raise substantial questions of fact. If the facts of this case are ultimately determined to be as alleged by the answer, all of the affirmative defenses will be legally sufficient.

If the insufficiency of a defense is based upon facts, their interpretation and application, or upon inferences to be drawn therefrom, such inferences are for the triers of fact and are not the determination of a question of law. Raitt vs. Seltzer, N.D. N.Y., 10 F.R.D. 48, 50.

It Is Therefore Ordered, Adjudged and Decreed that the motion of plaintiff to strike certain affirmative defenses be, and the same is, hereby denied upon all grounds.

Dated: February 18, 1953.

/s/ OLIVER J. CARTER,
United States District Judge.

[Endorsed]: Filed February 18, 1953.

[Title of District Court and Cause.]

NOTICE TO AMEND ANSWER

Please take notice that the defendant moves for the amendment of the Answer as follows:

For a Seventh Affirmative Defense

34. (a) That the plaintiff has failed to state a cause of action upon which relief can be granted under the provisions of 15 U.S.C. 714(b) and (c) for the reason that the Federal Tort Claims Act is applicable to suits against the Commodity Credit Corporation.

(b) That the Federal Tort Claims Act (28 U.S.C. 2680(h)) specifically excludes from the class of action upon which suit may be brought, any claim arising out of * * * "misrepresentation, deceit, or interference with contract rights."

(c) That the Federal Tort Claims Act (28 U.S.C. 2680(a)) specifically excludes from the class of action upon which suit may be brought, any claim "based upon the exercise or performance, or the failure to exercise or perform a discretionary function or duty on the part of a Federal Agency or an employee of the Government, whether or not the discretion involved be abused."

For an Eighth Affirmative Defense

35. That the plaintiff is not the real party in interest in this suit, and has no standing in this Court.

36. The attempt of Rosenberg Bros. & Co. to assign to the plaintiff, Rosenberg Bros. & Co. Inc., the claim upon which this action is brought, is void under Title 31, U.S.C. Sec. 203, which is incorporated in Article 15 of the contracts in suit.

.....

United States Attorney.

Of Counsel:

/s/ HERMAN WOLKINSON,
Attorney, Department of
Justice.

[Endorsed]: Filed August 26, 1953.

[Title of District Court and Cause.]

MEMORANDUM OPINION AND ORDER

Plaintiff, a Maryland corporation engaged in the processing of dried fruits, seeks to recover damages from defendant, Commodity Credit Corporation, for alleged breach of contract. The plaintiff, Rosenberg Bros. & Co., Inc., succeeded to all the assets and assumed all liabilities of the business known as Rosenberg Bros. & Company, a California corporation, on October 21, 1948. Plaintiff has operated the business since the date of its acquisition. The only change in nomenclature is the addition of "Inc." Hereafter plaintiff will be called "Rosenberg." Defendant is a federal corporation which succeeded to the assets of and assumed the liabilities and duties of Commodity Credit Corporation, a Delaware corporation, under the terms of its charter.(1) Hereafter defendant will be referred to as "CCC."

Plaintiff corporation sets forth two causes of action, based upon: (1) An express contract for the sale and purchase of raisins; (2) an implied promise on the part of defendant with respect to the signed agreement for the sale and purchase of raisins.

The litigation arises out of defendant's activities in the fall of 1947 in connection with the program of the Department of Agriculture in entering the dried fruit market. As the federal foreign aid program diminished following the war and the Armed Forces returned to this country and were discharged, the

(1) 15 U.S.C.A. 714(n).

wartime stimulated raisin industry found itself without a ready market for a large part of its product. Government action appeared to be necessary to save the raisin grower.

On September 5, 1947, the CCC announced a purchase program for dried fruits. The Secretary of Agriculture who was chairman of the board of CCC stated that CCC would purchase 61,000 tons of 1947 crop raisins. He further stated in his announcement that the CCC would purchase only from processors and packers. Finally, he announced that the purchase program did not provide for price support at any given level. (2) The Department of Agriculture hoped that the general purchase program would enable dried fruit growers and processors to establish prices at a fair level. When the CCC made its announcement of purchases it was advised by its own economists that the raisin surplus would be in the neighborhood of 100,000 tons. These same economists believed that unless the government prepared to acquire the entire surplus, the program might well depress the dried fruit market.

In September and October, 1947, the plaintiff, Rosenberg Bros. & Co., entered into contracts with the CCC for the sale of raisins. On October 14, 1947, and subsequent to the second contract, CCC announced a new and radically different program for the purchase of 60,000 additional tons of raisins. These new offers were made not only to packers and processors, but also to producers in the physical possession of raisins. The economic result of the

(2) Exhibit No. 4.

program whereby CCC would purchase the entire surplus of Thompson Seedless Raisins for 1947 was inevitable. The price for raisins rose substantially.

When plaintiff made its successful bids in September and October on some 14,000 tons of raisins it anticipated a grower price of approximately $110 per ton. This would have enabled it to make a fair profit on its sales to the CCC. After the October 14th change of program the grower price rose above $135 per ton. Plaintiff had made short sales at the time it entered into its contracts with CCC, mainly as a result of the demands of CCC that the large processors, including Rosenberg, participate at the very outset in the announced program. In addition, the short position was made necessary because the 1947 crop of raisins was not yet ready for sale by the growers.

The CCC, through its economist, Mr. S. R. Smith, whose forthright testimony tended to solve some of the complex issues, had recommended renegotiation of existing contracts between CCC and processors when the new government purchase program of an additional 60,000 tons had been announced. Under his recommendation packers would have paid growers not less than $135 per ton for natural condition raisins. By renegotiating with processors at a higher price, CCC would have enabled them to come out whole and at the same time would have permitted them to compensate growers on a fair basis. The CCC refused to act upon this recommendation.

From September through December of 1947, plaintiff failed to furnish raisins under its contracts with the CCC. Because of the uncertain condition of the market and grower resistance to low prices, plaintiff was unable to acquire raisins in large quantities in the latter part of September and the early part of October. Thereafter the CCC's new purchase program boosted prices so high as to make the acquisition of raisins prohibitive in terms of contractual liabilities.

The shortage of supplies and the high prices sought by the growers caused the CCC itself to reject all grower bids on November 26th on the ground they exceeded $135 per ton. Packers could not cover their CCC commitments at the exorbitant prices sought by growers.

On November 26th the CCC announced that it would require processors to certify they had paid producers not less than $135 per ton for natural condition raisins. Such requirement constituted the price support of $135 per ton. It may be remembered also, that previous to this marked departure from its program, the government announced through CCC that it would purchase directly from the grower.

Plaintiff alleges that such price support, together with the purchase of the additional 60,000 tons of surplus raisins, as well as the acquisition of raisins directly from the grower, constituted both a breach of the terms of CCC's promise to plaintiff, as expressed in the CCC announcement of September 5,

1947, and of an implied condition to refrain from interfering in the market.

During the winter months of 1947 and January of 1948, plaintiff attempted to renegotiate its contract with CCC or, in the alternative, sought to obtain cancellation. It failed in both efforts and on January 21, 1948, plaintiff received a telegram from CCC directing that it comply with the terms of its contracts. This it agreed to do on the following day.

In the course of the next several days certain terms were worked out between CCC and plaintiff as to the waiver by plaintiff of storage charges for the past period while negotiations were pending and by CCC for non-delivery in accordance with the terms of the contracts. By the end of the month plaintiff was shipping raisins in fulfilment of its contract obligations.

Rosenberg has alleged that as a direct and proximate result of CCC's conduct the acquisition of rasins from growers exceeded the normal and anticipated purchase price by $20 to $25 per ton. It is this differential which plaintiff seeks to recover from defendant for the alleged breach of contract.

The Issues Involved

Defendant contends that the September 5, 1947, press release was no more than that; that it was not a part of the contract with plaintiff nor did it bind the government to remain out of the raisin market for the balance of the growing year. Defendant points to the actual contracts signed by plaintiff and notes

that they purport to be complete on their faces, covering all conditions surrounding the sale and purchase of raisins.

The CCC asserts numerous defenses to the two causes of action set forth in the plaintiff's complaint: The answer denies that the press release was incorporated in the contracts;[3] CCC further denies that the purchase of an additional 60,000 tons of raisins constituted an interference with the performance of the contracts. It also asserts that plaintiff suffered no damages as a result of CCC's action.

Among other defenses defendant affirmatively asserts: That the plaintiff is not the real party in interest; that the Federal Tort Claims Act is applicable; that the written contracts alluded to are full and complete in themselves; that estoppel is not the basis for recovery against the United States of America or its agencies; that the suit in substance is one against the United States and it has not waived its immunity; that plaintiff waived its claim for damages.

The basic issue presented by the pleadings arises out of the asserted contract between Rosenberg and CCC. If the press release constitutes part of a basic agreement, then the CCC's subsequent conduct would constitute a breach of the express contract. On the other hand, if the two written agreements of September and October are complete in and of themselves, the CCC's later purchase program, including the establishment of a minimum tonnage figure of

[3] CCC Nos. 1647 and 1893.

$135 on November 26, 1947, would constitute a violation of an implied promise not to make more difficult the performance of the contracts by plaintiff.

The Implied Contract

The CCC, on September 5, 1947, made an announcement of its dried fruit purchase program. The announcement embodied three promises: (1) The CCC would purchase a maximum of not more than 61,000 tons of raisins; (2) it would purchase directly from processors and packers of dried fruit; (3) it would not provide price support at any given level. This press release followed study of recommendations by high officials in the Department of Agriculture and suggestions and criticisms made by executives in the processing industry. It culminated efforts on the part of all parties to stabilize the raisin market. The evidence adduced by both sides confirms the background events which preceded the signing of the two written contracts. Grower resistance to the buying program developed in September and continued through October. Pressure on the part of organized raisin growers led to revision of the CCC program. Prior to such revision, the negotiations between the parties pointed to a clear understanding on the part of both sides that the CCC announcement of September 5th expressed the intended future course of conduct on the part of the government. The manifest intention of the CCC inevitably led plaintiff and its fellow processors to bid on the basis of the then existing market level.

It was implied in the very nature of the transaction that the CCC would do nothing to prevent or hinder performance on the part of the plaintiff.(4) The drastic and radical departure of the government policy constituted a breach of the implied agreement with plaintiff.(5)

Defendant suggests that plaintiff assumed the risk of a change in the government program. This

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(4) United States vs. Peck, 102 U. S. 64; Cf. Baily vs. Railroad Co., 84 U. S. 96; Merriam vs. United States, 107 U. S. 437, 441.

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(5) Fuller Co. vs. United States, 69 F. Supp. 409; also Sunswick Corp. vs. United States, 75 F. Supp. 221.

The inevitable result of the change in program on the part of CCC through its purchase of an additional 60,000 tons of raisins both from growers and processors meant that those who had bid successfully on the two previous government contracts would be prejudiced because of the sharp increase in the price of raisins. C. S. Smith pointed out to the Department of Agriculture that the processors felt they had been dealt with unfairly. (Plaintiff's Ex. 50)

In his report Mr. Smith recommended renegotiation of existing contracts between CCC and processors covering the 61,000 tons which they had agreed to sell to the government. (Rep. Tr., p. 1146) His recommendation would have permitted packers to pay growers not less than $135 per ton for natural condition raisins, and prices to processors would be modified accordingly. C. S. Smith, who was a most careful witness, made such recommendation because he believed that renegotiation at a higher level was a fair solution to the problem of both processors and growers. (Rep. Tr. pp. 1356, 1360.)

Secretary of Agriculture Anderson rejected [illegible]

is a misapplication of the doctrine of assumption of risk. The parties did not, nor could they, contemplate the possibility of government hindrance or interference with the raisin purchase program as outlined in the September 5th announcement.

The basic of liability is real and compelling. The CCC adopted an unconscionable and wholly indefensible position, while it engaged in a purely proprietary function.[5a] It is not enough to say that

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recommendations: (Rep. Tr. p. 1096, l. 13.) "* * * As a business proposition I would not cancel it (the Rosenberg contract), because I felt that a free bid had been made and that those people must abide by their bid." It is apparent from the Secretary's answer that he considered the contract obligations of a proprietary nature, rather than governmental. In the course of conversation with Mr. Grady, the Secretary informed Grady, as testified to by the latter, that "he intended to teach the packers a lesson." (Tr. p. 517.) In elaboration of this statement he indicated that "You can't buck a four billion dollar corporation." (Tr. p. 518.)

In response to questioning by government counsel on the subject of the Secretary's relations with the packers, and in an effort to clarify that relationship, the Secretary testified as follows: (Rep. Tr. p. 1103, l. 11-16): "Mr. Grady testified some days ago that the controversy was that the newspaper story had said the packers had ganged up on me. That was not it at all. The statement was that I had said the packers had ganged up on the growers. And he asked me if I made that statement, and I told him that I had, that I believed it to be true* * *"

[5a] Amoskeag Mfg. Co. vs. United States, 84 U. S. 592.

CCC as an agency of the United States government was entitled to sovereign immunity.

The doctrine of sovereign immunity is not applicable to the facts at large and cannot afford a defense.

With respect to the defense of waiver of rights, plaintiff's conduct at the end of January, 1948, in arranging for shipment under the contract requirements did not in itself waive any rights arising by reason of the CCC's breach. The express waiver under the January modification dealt solely with subsidiary matters of storage charges and delayed shipment. Plaintiff preserved its rights. Defendant has the burden of proving waiver (F.R.C.P. (8)(c)), and has not discharged this burden.

The series of events leading up to the final shipment of raisins indicate an effort on the part of plaintiff to renegotiate or cancel the contracts. They do not point to waiver. Delivery itself following defendant's breach does not constitute a waiver of a damage claim.[6] Nor did acceptance of payments under the contract constitute a waiver.[7]

In view of the foregoing findings of liability under the second cause of action, it becomes unnecessary for the court to pass upon the first count. The other and separate defenses already alluded to require no specific attention and the court finds the same to be entirely without merit.

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[6] Bu-Vi-Bar Petroleum Corp v. Krow, 40 F. 2d 488.

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[7] Blair v. United States, 147 F. 2d 840.

Damages

After submission of the cause and extensive oral arguments, the court reopened the matter for additional discussion on the question of damages. The accounting problems implicit in the record, and the various theories of damage required, in the opinion of the court, additional consideration.

With respect to the basic accounting aspects, that is, to say, the arithmetical computation of the purchasing, closed and open orders, invoicing, sales invoice, etc., there has been no disagreement.[8] This work was engaged in through plaintiff's counsel. The problem, however, transcends the ordinary accounting problem for the reason that it is incumbent upon the court to adopt or reject one of a number of different theories espoused by the parties, on a somewhat arbitrary basis.

Counsel submitted a composite exhibit reflecting the following five theories of damage based upon relative costs and areas of purchase: (1) Average market price of $116.16 per ton (lowest market average from December 12th through the end of May, 1948); (2) $120.52 per ton (lowest market average from December 12th through date of actual delivery of raisins); (3) $128.13 per ton (average market level for period October 14, 1947, to the date of final delivery); (4) $129.34 per ton (average market level from June 1, 1947, to the date of final delivery); (5) $134.16 per ton (average market level at which

[8] Rep. Tr. Nov. 23, 24, 1954; p. 106, beg. l. 17.

plaintiff contends it purchased raisins after fulfilling civilian commitments).[9]

The government contends that plaintiff was not damaged and in effect is entitled to nothing. However, at the same time, it concedes that the foregoing theories are founded upon a valid, arithmetical background.[10]

The court must analyze plaintiff's loss in terms of certain variables in the raisin market:

Plaintiff was engaged in supplying private buyers, as well as the CCC, with raisins. The product itself is fungible. Plaintiff made no effort to allocate any particular raisins it purchased during the 1947-48 season to commercial or government contracts. Although liable for delivery of raisins under both contracts after entering into the two agreements, plaintiff did not actually acquire raisins in sufficient quantity to fulfill all its obligations nor did it make shipments when requested to do so by CCC during the period commencing October 16th and continuing through December 12, 1947. The grower price was at such a level that fulfilment of the CCC contracts would have resulted in loss to plaintiff during the several months referred to. However, plaintiff did meet its commercial obligations during the period in question. These obliga-

[9] See Defendant's Ex. AO, AC and Plaintiff's Ex. 58.

[10] Rep. Tr. Nov. 23, 24, 1954: p. 47, l. 9, 10.

tions exceeded many-fold the 14,330 ton liability extending to the CCC.

During the winter months of 1947 plaintiff made extensive and serious efforts to renegotiate the contract with CCC in the light of the changed program. As stated above it was the recommendation of S. R. Smith, Director of the Fruit and Vegetable Branch, Production and Marketing Administration, Department of Agriculture, a man of many years experience, that the government renegotiate its contracts with the processors.[11] Renegotiation of the contracts in view of the equities present would have avoided the present litigation and resulted in a fair termination of the acute problems confronting the parties. However, such proposed renegotiation was arbitrarily rejected by the CCC, leaving the parties to find their remedy, if any, in this forum. Parenthetically, it might be stated that it is understandable that pending a hope for settlement, plaintiff would make no serious effort to cover its contract liabilities by purchasing raisins at a level which would have resulted in greater losses.

By December 12th of 1947 plaintiff had contracted for 75% of its seasonal civilian obligations. Thus it would soon be in a position to acquire raisins for its government contracts. A reduction in the market level at this time would make compliance less costly than at an earlier date. The evidence indicates plaintiff commenced its purchase

[11] Plaintiff's Ex. 50.

of raisins from growers during the latter part of December in order to meet its CCC obligations.

When defendant refused to renegotiate and plaintiff received a firm demand on January 21, 1948, to commence deliveries under the two contracts it agreed to do so as soon as it had consummated certain waiver provisions with CCC. During the months of February and March, 1948, plaintiff made actual deliveries of raisins.

The record does not disclose with precision when plaintiff actually purchased the specific raisins which it delivered to CCC; but by reconstructing plaintiff's raisin business in terms of fulfilment of commercial obligations and acquisition of sufficient quantities to meet government obligations, the court is able to determine, with reasonable accuracy, the actual cost to plaintiff of raisins.

The parties themselves have suggested five theories for measuring damages as noted above, based on variable estimates of actual cost to plaintiff of raisins purchased to fulfill contracts. In all of these theories the parties have assumed a price of $110 per ton as the level at which plaintiff could have purchased raisins in the absence of government intervention in the program. The difference between this figure and the several amounts suggested constitute the differential which establishes the measure of plaintiff's damages.

The procedure which the court believes is commensurate with the actual practices engaged in by

plaintiff—practices which did much to mitigate damages and minimize loss suffered—is that of determining the lowest prices paid for the acquisition of raisins during the winter months of the 1947-48 season, beginning December 12, 1947, and concluding March 25, 1948, when shipments under the two contracts in question were completed. This is the period when plaintiff purchased in sufficient quantities to meet its government obligations over and above its commercial contracts.

The comparatively low prices of raisins during this period resulted in an average of $120.52 per ton or a loss to plaintiff of $10.52 per ton. By applying such loss factor to the tonnage contracted for by the CCC and allowing for shrinkage of 6% on raisins purchased from growers the court arrives at a figure of $160,366.88 as the amount of damages to which plaintiff is entitled.

The court, in arriving at the foregoing figure, has considered the variables: the price actually paid for the raisins purchased, the period of time during which the purchases were made, the level of the market had the government not intervened in the program on October 14, 1947, and the actual margin required by plaintiff in order to come out whole under the government purchase program.

Accordingly, It Is Ordered that judgment be entered in favor of plaintiff in the amount of $160,366.88 together with its costs. Plaintiff is to prepare

findings of fact and conclusions of law in accordance with this opinion.

Dated: February 25, 1955.

s/ GEORGE B. HARRIS,
United States District Judge.

[Endorsed]: Filed February 25, 1955.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled action having been tried by a court sitting without a jury, the court hereby makes the following findings of fact and conclusions of law:

Findings of Fact

1. Rosenberg Bros & Co. (hereinafter referred to as RB&Co), at all times in which the events giving rise to the causes of action contained in the complaint occurred, was a corporation organized and existing under and by virtue of the laws of the State of California, engaged in the business, among other things, of processing, packaging and selling raisins.

2. Rosenberg Bros. & Co., Inc., plaintiff in the above-entitled action (hereinafter referred to as Rosenberg), is now and at all times since October 21, 1948, has been a corporation duly organized and existing under and by virtue of the laws of the

State of Maryland, qualified to do and doing business in the State of California, and having its principal office in said State in the City and County of San Francisco. On October 21, 1948, after acquiring all of the outstanding stock of RB&Co, Rosenberg, by operation of law as the result of proceedings for the dissolution of RB&Co, succeeded to all of the assets and assumed all of the liabilities of RB&Co, and ever since said date has continued to carry on the business theretofore carried on by RB&Co.

3. Among the assets of RB&Co, to which Rosenberg succeeded, as aforesaid, was a claim against Commodity Credit Corporation which is the subject of the above-entitled action.

4. Commodity Credit Corporation (hereinafter referred to as CCC), at all times herein mentioned prior to June 29, 1948, was a private corporation organized and existing under and by virtue of the laws of the State of Delaware, and all of the stock of said Delaware corporation was beneficially owned by the United States.

5. Commodity Credit Corporation, defendant in the above-entitled action (hereinafter referred to as Commodity), is now and ever since June 29, 1948, has been, a corporation duly organized and existing under and by virtue of the laws of the United States. On or about July 1, 1948, Commodity succeeded to all of the assets and assumed all of the duties and liabilities of CCC, and all enforceable claims against CCC, including the claim

on which the above-entitled action is based, became claims enforceable against Commodity. The United States has at all times since the organization of Commodity been the beneficial owner of all said corporation's outstanding stock.

6. The Production and Marketing Administration (hereinafter referred to as PMA) now is, and at all times herein mentioned was, an administrative agency within the Department of Agriculture, the officials and employees of which, among their other duties and functions, act as agents of CCC and assist CCC in carrying out various food purchase programs, and PMA and its agents and employees did assist CCC in carrying out its 1947 raisin purchase program.

7. In the years 1947 and 1948, Clinton Anderson was the Secretary of Agriculture of the United States, and as Secretary, held the ex officio position of Chairman of the Board of Directors of CCC, and exercised all rights of stock ownership in CCC on behalf of its sole stockholder, the United States; Jesse Gilmer was Administrator of PMA and President of CCC; and other Directors and Vice Presidents of CCC also served as officers of PMA.

8. The best estimates of the 1947 Thompson seedless raisin crop in August and September, 1947, indicated that there would be a surplus (excess of production over trade demand) of at least 100,000 tons. These estimates were known to and concurred in by the Fruit and Vegetable Branch of PMA and

by CCC at the time when CCC's 1947 raisin purchase program was formulated and adopted.

9. A plan for the 1947 dried fruit purchase program of CCC was prepared by the Fruit and Vegetable Branch of the PMA, and was submitted to the Board of Directors of CCC and to the Secretary of Agriculture for approval in the month of August, 1947. On or about August 27, 1947, the Board of Directors of CCC adopted said plan with certain modifications and the adopted plan was entitled "Docket OC-95a." Said Docket OC-95a was approved by the Administrator of PMA on September 9, 1947, and by the Acting Secretary of Agriculture on September 11, 1947. Said Docket in the form adopted and approved called for a maximum purchase of 133,000 tons of dried fruit, including 61,000 tons of Thompson seedless raisins. Said Thompson seedless raisin purchase was based on an indicated surplus of 98,000 tons of processed raisins, which, on the basis of a 6% shrinkage factor, reflected a surplus of approximately 104,000 tons of natural condition raisins. The basis of the raisin purchase program embodied in said Docket was the purchase of a limited quantity of raisins for certain enumerated outlets, on an offer and acceptance basis rather than on a negotiated or fixed price, and said program did not contemplate the purchase of an unlimited quantity of raisins to maintain prices at any given level.

10. On or about September 5, 1947, Secretary Anderson, acting on behalf of CCC, issued an an-

nouncement which generally outlined CCC's 1947 dried fruit purchase program, and which was the same program embodied in Docket OC-95a. A draft of said announcement was prepared in the Fruit and Vegetable branch of PMA and was issued over the signature of Secretary Anderson after being edited by the Secretary, the President of CCC and others at Albuquerque, New Mexico. Said announcement was released in written form to the press, and copies were sent by the U. S. Department of Agriculture to the various members of the dried fruit industry, including RB&Co.

11. Secretary Anderson's said announcement of September 5, 1947, stated:

> (a) that CCC would purchase up to a maximum of 133,000 tons of dried apples, dried peaches, dried prunes, and raisins, including a maximum of 61,000 tons of raisins;
>
> (b) that such purchase would be made from processors and packers on a competitive bidding basis;
>
> (c) that the purchase program did not provide price support at any given level but would enable the dried fruit industry to complete plans for readjustment on a self-help basis.

12. Said September 5 announcement was the only announcement of the entire original 1947 dried fruit purchase program made or circulated by CCC.

13. Secretary Anderson and CCC intended that packers and processors rely on said September 5

announcement in preparing and making bids for sale of dried fruit (including Thompson seedless raisins) to CCC; and RB&Co, in making its bids for sale of raisins to CCC under CCC's 1947 raisin purchase program did rely on such announcement and did make its bids on the basis thereof.

14. Said announcement of September 5, 1947, was made by Secretary Anderson, acting on behalf of CCC, with contractual intent. The Court does not, however, base its decision on this ground.

15. In order to implement CCC's dried fruit purchase program so announced on September 5, 1947, PMA issued Announcement No. 1 on September 10, 1947, inviting packers and processors to make offers for sale to CCC of up to 30,000 tons of Thompson seedless raisins to be delivered in the period October 1 through December 15, 1947, as specified by CCC; and CCC on October 1, 1947, issued Announcement No. 2 inviting packers and processors to make offers for sale to CCC of an additional 31,000 tons of Thompson seedless raisins to be delivered in the period October 20, 1947, through January 20, 1948, as specified by CCC. The total quantity of Thompson seedless raisins covered by said announcements equalled the maximum raisin purchase (61,000 tons) contemplated by and stated in the Secretary's said September 5 announcement.

16. The direct and proximate economic effect of a purchase by CCC of 61,000 tons of packed and

processed Thompson seedless raisins on a competitive bidding basis in a year when there was an indicated surplus of over 100,000 tons of natural condition raisins was to depress the field price of Thompson seedless raisins to a level of approximately $110 per ton. This depressing effect was more pronounced because bids for the 61,000 tons to be purchased by CCC were received in two stages, and those bidders who had been unsuccessful in the first stage were expected to and did enter lower bids on CCC's second call. There is a direct relationship between the prevailing price for packed processed raisins and the field price for natural condition raisins, and the level of the bidding under Announcement No. 1 and Announcement No. 2 was reflected in the field price for natural condition raisins.

17. Immediately after the issuance of the September 5 Announcement, RB&Co called the inadequacy of CCC's raisin purchase program to the attention of CCC and PMA officials and pointed out its price depressing effects. Said CCC and PMA officials ignored RB&Co's protest and informed RB&Co that its cooperation was solicited and expected to make the purchase program "as announced" a success.

18. RB&Co, in reliance on the 1947 CCC raisin purchase program, as announced on September 5, 1947, and in response to Announcement No. 1 and the Department's plea for cooperation, on September 17, 1947, offered to sell CCC 12,000,000 lbs. of

processed raisins at .0755 per lb. ($151 per ton) and 8,000,000 lbs. of processed raisins in export containers at .0760 per lb. ($152 per ton). RB&Co's entire offer was accepted by CCC on or about September 23, 1947.

19. RB&Co, in reliance on the 1947 CCC raisin purchase program as announced on September 5, 1947, and in response to Announcement No. 2 and the Department's plea for cooperation, on October 8, 1947, offered an additional 20,000,000 lbs. of processed raisins to CCC. CCC, by night letter sent October 13, 1947, and received by RB&Co on the morning of October 14, 1947, accepted 8,660,000 lbs. of these raisins at a price of .0747 per lb. ($149.40 per ton).

20. Both of the aforesaid sales of Thompson seedless raisins by RB&Co to CCC were short sales, as were the sales of the other independent packers who were successful bidders under Announcement No. 1 and Announcement No. 2. Sunmaid, a raisin growers' cooperative, which was also a successful bidder under said Announcements, had the entire production of all of its grower members under contract before the 1947 season opened. RB&Co continued in a short position so far as the total quantity of raisins needed to fulfill both its aforesaid CCC contracts was concerned until after November 26, 1947.

21. CCC and PMA knew at the time when CCC accepted RB&Co's said bids on September 23 and October 13, 1947, that all independent packers' sales

(including sales by RB&Co) to CCC were short sales and that the independent packers, including RB&Co, would have to cover such sales to CCC by purchasing Thompson seedless raisins in the field at a later date. CCC and PMA also knew at the time said independent packers' bids under Announcements No. 1 and No. 2 were accepted, and continuously until as late as October 23, 1947, that said independent packers, including RB&Co, continued in a short position.

22. RB&Co did not designedly sell short to CCC in making offers under Announcements No. 1 and No. 2, with the purpose of later making a large profit, but could participate in such CCC purchases only by taking a short position. RB&Co made such offers with a purpose of maintaining its position in the dried fruit industry and with a desire to cooperate as requested by the Department of Agriculture in making CCC's 1947 raisin purchase program, as announced on September 5, a success. At the time RB&Co made such offers, natural condition raisins of the 1947 crop were not available for purchase by RB&Co in sufficient quantities to cover said large CCC sales. Furthermore Announcement No. 1 was made and bids were received thereunder before the 1947 raisin crop was completed.

23. For the 1947 raisin crop the generally accepted "spread" between the price of processed Thompson seedless raisins in bulk packages and the price of natural condition Thompson seedless raisins was a sum slightly in excess of $40 per ton.

Offers made by the independent packers and by Sunmaid under Announcements No. 1 and No. 2 for packed processed raisins reflected a field price for natural condition raisins of approximately $110 per ton.

24. It was the considered opinion of the officials of RB&Co at the time when RB&Co bid under Announcements No. 1 and No. 2 as aforesaid, that under the 1947 CCC raisin purchase program, as originally announced on September 5, 1947, RB&Co would have been able to cover its aforesaid sales to CCC at $110 per ton or less, and RB&Co's said offers under announcements No. 1 and No. 2 were made upon such assumption. Furthermore, it is a fact that had CCC's 1947 raisin purchase program as announced on September 5, 1947, remained unchanged, RB&Co could have covered its aforesaid sales to CCC at $110 per ton or less.

25. On October 9, 1947, the Board of Directors of CCC, in executive session, with the approval of the Secretary of Agriculture adopted an amendment to CCC's 1947 Dried fruit purchase program as announced September 5, 1947. Said amendment increased the quantities of dried fruit to be purchased to quantities substantially in excess of the maximum purchase announced as aforesaid on September 5, 1947, increasing the maximum quantity of raisins to be purchased from 61,000 tons to 121,000 tons. The contents of this amendment were not made known outside of the CCC organization, and packers and processors, including RB&Co, whose

bids were then pending under Announcement No. 2 did not acquire knowledge of said increased maximum quantities to be purchased by CCC until October 14, 1947, after their pending bids had been accepted by CCC.

26. On October 14, 1947, after CCC had accepted packer bids (including RB&Co's bid for 8,660,000 lbs.) to furnish Thompson seedless raisins to CCC under announcement No. 2, PMA publicly announced to packers and processors that producers and others in physical possession of raisins would be invited to offer immediately to CCC an additional 60,000 tons of Thompson seedless raisins.

27. On October 17, 1947, the Board of Directors of CCC further amended CCC's original 1947 raisin purchase program to allow CCC to accept bids on natural condition raisins and bids for packing and processing the same.

28. On October 17, 1947, PMA announced publicly to packers and processors further details concerning the amendments to CCC's 1947 raisin purchase program, stating that to implement the purchase of an additional 60,000 tons of raisins, offers for natural condition raisins and processed raisins would be invited from producers and offers for processed packed raisins would be invited from others than producers.

29. The principal changes in CCC's 1947 raisin purchase program announced on October 14, 1947, and October 17, 1947, were as follows:

(a) An increase in the maximum purchase of Thompson seedless raisins by 60,000 tons over and above the 61,000 tons already purchased and designated as CCC's maximum purchase by the September 5 announcement.

(b) An addition to the sources from which CCC would purchase raisins through an invitation for offers to CCC from producers and others in physical possession of raisins.

30. The changes in CCC's 1947 raisin purchase program so announced by PMA on October 14 and 17, 1947, were subsequently carried out by CCC.

31. Immediately upon receiving knowledge of the aforesaid changes in CCC's 1947 raisin purchase program, on October 14, 1947, RB&Co sent a telegram to Secretary Anderson requesting cancellation of its aforesaid raisin contracts with CCC on the ground that its bids were based on the program as originally announced by the Secretary on September 5, 1947, and on the remaining surplus indicated by such program. On October 15, 1947, RB&Co supplemented this request with a further telegram offering to cancel all of its existing grower contracts for Thompson seedless raisins calling for prices of less than $140 per ton, in order to allow growers to enjoy the benefits of CCC's amended program.

32. On November 6, 1947, Secretary Anderson rejected RB&Co's request for cancellation.

33. On November 26, 1947, in spite of the provisions of the aforesaid September 5 announcement

that CCC would not support prices at any given level, PMA publicly announced to packers and processors that in the future CCC would require all packers selling Thompson seedless raisins to CCC to certify that they had paid producers not less than $135 per ton for natural condition raisins used in processing packed raisins offered to CCC.

34. The immediate economic effect and the direct and proximate result of the aforesaid changes in CCC's 1947 raisin purchase program so announced on October 14 and 17, 1947, was a rise in field prices for natural condition Thompson seedless raisins to a level in excess of $135 per ton, and the offering of substantial tonnages by growers to CCC. Such tonnages were removed from the possibility of packer purchase until all grower bids were rejected by CCC on November 26, 1947, as excessive. The immediate economic effect and the direct and proximate result of PMA's announcement of November 26, 1947, requiring certification by packers on all sales to CCC that they had purchased the raisins offered from growers at a price of $135 per ton, together with said other amendments to CCC's 1947 raisin purchase program, was the fixing of the field price for natural condition Thompson Seedless raisins at a level of $130-$135 per ton. This price level continued from the end of November, 1947, until the end of December, 1947.

35. The aforesaid October 14 and 17 and November 26 amendments were the direct and proximate causes of the foregoing price rise for natural condition Thompson seedless raisins, and 1947 field prices

for Thompson seedless raisins would have remained at a level of $110 per ton or less had it not been for said amendments and their implementation by CCC.

36. Because of CCC's actions as aforesaid the market for 1947 crops natural condition raisins continued at artificially and abnormally high levels until the market established at $135 per ton when CCC on November 26, 1947, rejected grower offers to CCC at prices in excess of $135 per ton and required all packers and processors to certify that all raisins furnished to CCC were acquired from growers at not less than $135 per ton. RB&Co was unable to cover its sales commitment to CCC in the period before November 26, 1947, because of said abnormally and artificially high price level.

37. CCC and PMA had knowledge at the time when all of such amendments were announced that RB&Co and other independent raisin packers had not yet purchased natural condition raisins to cover their sales commitments to CCC under Announcements No. 1 and No. 2.

38. In the period of time after RB&Co had obtained knowledge of the amendments to CCC's 1947 raisin purchase program on October 14, 1947, and until RB&Co actually delivered the raisins covered by its aforesaid contracts, RB&Co continually and consistently sought cancellation of said contracts or renegotiation of prices to a level which would enable it to cover its CCC commitment without loss. In its communications with CCC and PMA through-

out this period, including its communications relating to deliveries of raisins, RB&Co endeavored to protect its contractual position as well as to leave open the possibility of renegotiations or other settlement of its said CCC contracts. CCC refused at all times to cancel RB&Co's aforesaid contracts, and although renegotiation of prices was recommended by the Chief of the Fruit and Vegetable branch of PMA, CCC rejected this recommendation, and continually and repeatedly insisted on delivery by RB&Co at contract prices.

39. After an exchange of telegrams and telephone calls between RB&Co and the contracting officer of CCC in the period from January 26 through 29, 1948, RB&Co agreed to deliver the raisins covered by its aforesaid contracts with CCC without expressly or impliedly waiving its rights to claim damages against CCC for the additional cost of acquiring raisins to cover such contracts occasioned by CCC's amendments to its 1947 raisin purchase program.

40. RB&Co shipped to CCC all the raisins covered by its contract entered into with CCC pursuant to Announcement No. 1 in the period from February 2, 1947, through February 25, 1948. RB&Co shipped to CCC all the raisins covered by its contract entered into with CCC pursuant to Announcement No. 2 in the period from March 1, 1947, through March 9, 1948.

41. After completion of such shipments, RB&Co continued to press its aforesaid claim against CCC

for renegotiation of prices or recovery of damages. RB&Co has never either expressly or by its conduct waived such claim for damages against CCC, and neither shipment of said raisins, nor the circumstances of such shipment, nor acceptance of the contract price for such shipment by RB&Co constitute a waiver of its right to hold CCC in damages for the additional cost of acquiring raisins to cover its CCC contracts occasioned by CCC's amendments to its 1947 raisin purchase program.

42. CCC's 1947 raisin purchase program was private and proprietary in nature, was carried out by CCC for its own account in its corporate name and capacity, and did not involve the exercise of sovereign or governmental power. Both CCC's purchases of raisins, pursuant to the program originally announced on September 5, 1947, and those purchases made pursuant to the aforesaid amendments to CCC's original raisin purchase program, were commercial transactions designed to acquire packed and processed raisins for certain limited outlets at the lowest price which CCC could obtain through competitive bidding. CCC made all purchase contracts under the original and the amended program (including its purchase contracts with RB&Co which are the subject of this suit) in its own name and for its own account.

43. The aforesaid amendments to CCC's raisin purchase program and CCC's purchases implementing such amendments were the direct and proximate cause of RB&Co's increased cost in ac-

quiring raisins to cover its sales commitments to CCC under its contracts entered into pursuant to Announcement No. 1 and Announcement No. 2. Said conduct of CCC in amending its 1947 purchase program and in implementing such amendments made it more difficult and expensive for RB&Co to perform its said contracts with CCC and hindered RB&Co in the performance of such contracts.

44. RB&Co did not assume the risk that CCC, in direct contradiction to the announcement of CCC's 1947 raisin purchase program made by the Secretary of Agriculture on its behalf on September 5, 1947, would purchase more than 61,000 tons of raisins, or purchase raisins from producers in competition with processors and packers, or impose any requirement upon processors that all raisins furnished to CCC be purchased from producers at no less than $135 per ton, which requirement, in effect, supported prices at that level.

45. Thompson seedless raisins are fungible goods.

46. In acquiring Thompson seedless raisins from producers in the 1947-1948 crop season RB&Co purchased both on open and on closed contracts. Closed contract purchases were made at a fixed price. Open contracts could be closed at the option of the selling producer, at any time when RB&Co was buying, at the price which RB&Co was then offering; and if they were not closed by a certain date, were by their terms to be closed at the market

price ruling 7 days after said date for raisins of the same variety, quality and grade. Both open and closed contracts immediately passed title to RB&Co. RB&Co could under both open and closed contracts acquire physical possession of raisins purchased at its earliest convenience after the raisins were made, since producers bore the risk of loss on undelivered fruit and stood ready to deliver at any time.

'47. The business practice of RB&C was to cost acquired raisins in the order and at the prices at which open contracts were closed or closed contracts were made.

48. The lowest price at which RB&Co could have acquired natural condition Thompson seedless raisins for the purpose of delivery to CCC under its aforesaid contracts was an average of $120.52 per ton.

49. In converting natural condition raisins to packaged processed raisins there is a certain weight shrinkage and stemmer loss. The factor used to convert natural condition Thompson seedless weight to packed processed weight in the 1947-1948 season was 6%. Accordingly, 15,244 tons of natural condition raisins were required to fulfill RB&Co's 14,330 ton commitment to CCC under aforesaid contracts.

50. Since RB&Co would have been able to acquire 15,244 tons of natural condition Thompson seedless raisins to fulfill its aforesaid CCC commitments at a price of $110 per ton or less had it not been for the October 14 and 17 and the November

26 amendments to CCC's raisin purchase program and the implementation of those amendments by CCC, RB&Co was damaged in the sum of One Hundred Sixty Thousand Three Hundred Sixty-six and 88/100 Dollars ($160,366.88) as a result of CCC's amended raisin purchase program.

Conclusions of Law

1. CCC's contracts to purchase raisins from RB&Co, arising out of the announcement of CCC's 1947 raisin purchase program on September 5, 1947, by Secretary Anderson, Announcements No. 1 and No. 2 issued pursuant thereto, RB&Co's offers in reliance thereon and CCC's acceptance of those offers, contained an implied covenant that CCC would do nothing to hinder or prevent performance of said contracts by RB&Co or to render such performance by RB&Co more difficult or expensive.

2. The actions of CCC in amending its 1947 raisin purchase program originally announced on September 5, 1947, by increasing the quantity of raisins to be purchased from 61,000 tons to 121,000 tons, by making purchases directly from producers in competition with packers (including RB&Co), and in requiring processors to certify that all processed raisins furnished to CCC had been acquired from producers at not less than $135 per ton were all actions taken by CCC contrary to said September 5, 1947, announcement, and constituted a breach of CCC's implied contract with RB&Co not to make performance by RB&Co of its outstanding contracts

to sell raisins to CCC at a fixed price more difficult or expensive and not to hinder or interfere with RB&Co's performance under said contracts.

3. RB&Co did not as a matter of law waive its right to claim damages from CCC for breach of the aforesaid implied contract and Rosenberg did not as a matter of law waive its right, as a successor of RB&Co, to claim damages from CCC or Commodity, the statutory successor of CCC, for breach of CCC's aforesaid implied contracts with RB&Co.

4. Purchases of raisins by CCC under it original 1947 raisin purchase program and under its amended 1947 raisin purchase program and the imposition of a condition on processors bidding under such purchase program that raisins supplied to CCC be purchased from producers at not less than $135 per ton, were corporate, commercial, and private acts of CCC, and did not involve the exercise of governmental and/or sovereign powers. CCC is accordingly liable in damages to RB&Co for any of such acts which were in breach of contract.

5. CCC is a private Delaware corporation and not entitled to the immunity of a sovereign from suit.

6. Rosenberg, succeeded to the assets and assumed the liabilities of RB&Co by operation of law pursuant to a corporate dissolution and merger and not as the result of a voluntary assignment and is

not subject to the Assignment of Claims Act. Title 31 U.S.C. Sec. 203.

7. The said Assignment of Claims Act does not apply to this action against Commodity, a Federal corporation.

8. Plaintiff's cause of action against Commodity is not based upon estoppel.

9. The United States of America is not an indispensable party to the above-entitled action, and the action is not one in substance against the United States of America, but is a suit against Commodity, a Federal corporation.

10. Plaintiff's complaint is not barred by the Federal Tort Claims Act, 28 U.S.C. Sec. 2680.

11. Plaintiff is entitled to recover from defendant the sum of One Hundred Sixty Thousand, Three Hundred Sixty-six and 88/100 Dollars ($160,366.88), together with costs of suit herein incurred.

Dated this 27th day of May, 1955.

/s/ GEORGE B. HARRIS,
United States District Judge.

Receipt of copy acknowledged.

Lodged March 25, 1955.

[Endorsed]: Filed May 27, 1955.

In the United States District Court, Northern District of California, Southern Division

Civil Action No. 30073

ROSENBERG BROS. & CO., INC.,

Plaintiff,

vs.

COMMODITY CREDIT CORPORATION,

Defendant.

JUDGMENT

This cause coming on to be heard by the Court sitting without a jury, The Honorable George B. Harris presiding, on the 25th day of August, 1953, and the Court having heard all the evidence adduced, and being fully advised in the premises,

It Is Hereby Ordered, Adjudged and Decreed as follows:

1. That the plaintiff have and recover of and from defendant One Hundred Sixty Thousand, Three Hundred Sixty-six and 88/100 Dollars ($160,366.88) and costs of this action and have execution therefor.

Dated: May 27, 1955.

/s/ GEORGE B. HARRIS,
United States District Judge.

Service of copy acknowledged.

Lodged March 28, 1955.

[Endorsed]: Filed May 27, 1955.

Entered May 31, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the defendant Commodity Credit Corporation hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment made and entered herein May 31, 1955, in favor of the above plaintiff.

Dated: June 30, 1955.

LLOYD H. BURKE,
United States Attorney:

By /s/ CHARLES ELMER COLLETT,
Assistant U. S. Attorney.

[Endorsed]: Filed June 30, 1955.

[Title of District Court and Cause.]

NOTICE OF CROSS-APPEAL

Notice Is Hereby Given that the plaintiff, Rosenberg Bros. & Co., Inc., hereby appeals by way of cross-appeal to the United States Court of Appeals for the Ninth Circuit from that part of the final judgment made and entered herein on May 31, 1955, finding damages in favor of plaintiff in the sum of $160,366.88.

Dated: July 25, 1955.

/s/ LLOYD W. DINKELSPIEL,

/s/ EDWARD W. ROSSTON,
HELLER, EHRMAN, WHITE
& McAULIFFE,

/s/ MELVILLE EHRLICH,
BELL AND EHRLICH,
Attorneys for Plaintiff and
Cross-Appellant.

[Endorsed]: Filed July 25, 1955.

The United States District Court, Northern District of California, Southern Division

No. 30073

ROSENBERG BROS. & CO., INC.,

Plaintiff,

vs.

COMMODITY CREDIT CORPORATION,

Defendant.

Before: Hon. George B. Harris, Judge.

REPORTER'S TRANSCRIPT

Tuesday, August 25, 1953

Appearances:

For the Plaintiff:
MELVILLE EHRLICH, ESQ. and
HELLER, EHRMAN, WHITE & McAULIFFE, by
LLOYD DINKELSPIEL, ESQ. and
EDWARD W. ROSSTON, ESQ.

For the Defendant:

HERMAN WOLKINSON, ESQ.,

Attorney, Department of Justice; and

RUSSELL JOHNSTON, ESQ.,

Office of the Solicitor, Department of Agriculture.

* * *

RICHARD E. GUGGENHIME

called as a witness on behalf of the plaintiff. Sworn.

The Clerk: Please state your name, your address and your occupation to the Court.

The Witness: Richard E. Guggenhime, G-u-g-g-e-n-h-i-m-e. My address is 14 Montgomery Street, San Francisco. I am an Attorney-at-Law, member of the firm of Heller, Ehrman, White and McAuliffe.

Direct Examination

By Mr. Dinkelspiel:

Q. Mr. Guggenhime, in the course of your professional work did you have occasion to do any business for the plaintiff in this action, Rosenberg Bros. & Co., Inc.?

A. Yes, Mr. Dinkelspiel.

Q. Are you familiar with the incorporation?

A. Yes, sir.

Q. Will you state the facts of your personal knowledge?

A. A corporation was incorporated under the laws of the State of Maryland, known as the Cummings Corporation in October, 1947.

(Testimony of Richard E. Guggenhime.)

Early in November, 1947, the Cummings Corporation was qualified to do business in California. As the Cummings Corporation an agreement to acquire the stock of Rosenberg Bros. & Co., a California company, was entered into, and early in 1948 substantially all of the stock of the California company [86*] was acquired by the Maryland company.

In the several months following January 1948, the balance of the California company was acquired by the Maryland corporation, so that by early spring of 1948 the California company, then Rosenberg Bros. & Co., was a wholly owned subsidiary of the Cummings Corporation, a Maryland corporation.

In October, 1940, a plan of liquidation was adopted by the Board of Directors of the California corporation approved by the sole stockholder at a special meeting called for that purpose of the California corporation, namely, the Maryland corporation, and pursuant to that plan of liquidation, all of the assets of the company were distributed to its sole stockholder, the Maryland corporation, in exchange and in consideration of the cancellation—surrender and cancellation of all of the stock of the California company then owned by the Maryland corporation.

Contemporaneously with that liquidation of the California company, the name of the California company was changed from Rosenberg Bros. & Co.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of Richard E. Guggenhime.)

to Roberg Liquidating Co., and the name of the Maryland Corporation was changed to Rosenberg Bros. & Co., Inc., which I believe is the name of the plaintiff in this litigation.

Q. The plaintiff in this litigation then is a Maryland corporation, qualified to do business in the State of California? A. Yes, sir. [87]

Q. And it has succeeded to all of the assets, claims, and the like of Rosenberg Bros. & Co., a former California corporation, as of sometime in 1948?

A. As of the close of business October 20, 1948.

Q. By which time——

Mr. Wolkinson: Just for the record, I wish to object to that question which counsel just put to counsel. That's a crucial issue in this case, of course, as to whether the claim in suit, as distinguished from the proceeds of the sale are in the hands of the present plaintiff, and it was counsel's statement just now, succeeded to the assets, and in substance, the liabilities, in their complaint they sort of gloss over this, and I feel on behalf of the defendant I must register my objection.

The Court: Well, I take it that the assets were transferred——

Mr. Dinkelspiel: I shall prove it, your Honor.

The Witness: I have before me the minute book of the Maryland Company. By resolution of the Board of Directors, and at that time I was a director of the Maryland Corporation, I am reading

(Testimony of Richard E. Guggenhime.)

from Page 44 of the minute book, these being minutes of a special meeting of the Board of Directors held on October 21, 1948. The resolution reads: —I will read the entire first paragraph.

"Resolved that this corporation accept, [88] receive, take possession of and take all necessary or proper steps to protect its right and title to and possession of, or otherwise recover or enjoy, all of the assets, rights, claims, contracts, commitments, actions, causes of action, franchises, privileges, good will and business heretofore owned, possessed, or enjoyed by Roberg Liquidating Co., a California corporation, formerly Rosenberg Bros. & Co., or to which the said Roberg Liquidating Co. is entitled or has any claim or right to or interest in, and to accept and obtain any, all bills of sale, conveyances, transfers, deeds or other instruments, necessary or proper, to effectuate the foregoing and to cause the same to be registered or otherwise placed of record in such manner and such authority for its officers as may be deemed advisable or proper." [89]

Mr. Dinkelspiel: Now, I show you Mr. Wolkinson, that which you have already seen and which I have already furnished you a copy, a bill of sale and conveyance from Roberg Liquidating Co., to Rosenberg Bros. & Co., Inc. This is the first time in my experience, your Honor, that I have had to go through this sort of proof, but counsel warned me that I would have to.

* * *

Q. (By Mr. Dinkelspiel): I ask you, Mr. Guggenhime, if you can identify that document?

(Testimony of Richard E. Guggenhime.)

A. Yes, Mr. Dinkelspiel.

Q. That purports to be, does it, a bill of sale and conveyance from Roberg Liquidation Co., to Rosenberg Bros. Co., Inc.?

A. This is the orginal bill of sale and conveyance.

The Court: That may be marked. [90]

Mr. Dinkelspiel: May I substitute a copy, your Honor?

The Clerk: Plaintiff's Exhibit ——

Mr. Dinkelspiel: Plaintiff's Exhibit 1, I suppose.

The Clerk: In evidence. Plaintiff's Exhibit 1 in evidence.

The Court: So ordered.

(Whereupon document referred to above was marked Plaintiff's Exhibit 1 and admitted into evidence.)

Mr. Dinkelspiel: You may cross-examine. [91]

* * *

Redirect Examination

By Mr. Dinkelspiel:

Q. In view of counsel's questions, I would like to interrogate Mr. Guggenhime shortly further.

You may have answered these but I would like to get a clear statement in the record.

Mr. Guggenhime, I understand your testimony that the Cummings Corporation acquired the stock of Rosenberg Bros. & Co., a California corporation?

(Testimony of Richard E. Guggenhime.)

A. Yes, sir.

Q. That 90 per cent or more of that stock had been acquired by January 7, 1948?

A. Yes, sir.

Q. And when did Rosenberg Bros. & Co. become a wholly-owned subsidiary of the Cummings company?

A. I cannot give you that exact date, but my best recollection is that it was prior to April of 1948.

Q. April of 1948. But at some time in that year Rosenberg Bros. & Co., a California corporation became a wholly-owned subsidiary of the Cummings company? [116] A. Early in that year.

Q. Early in that year. And the Cummings Corporation, being the same company, plaintiff in this action, the Maryland corporation?

A. Yes, Mr. Dinkelspiel.

Q. Then was the name of Rosenberg Bros. & Co. changed or so it became Roberg Liquidating Company?

A. That was done contemporaneously with the liquidation of its—with its liquidation and distribution of assets to its parent.

Q. So there was an amendment of the Articles of of Incorporation of Rosenberg Bros. & Co. to become Roberg Liquidating Co.?

A. That is correct. Those articles, the articles of the Maryland company, the name was changed from the Cummings Corporation——

Q. Let's forget that for a moment. Let's stay with California. But that was the change in the name of the California corporation by amendment

(Testimony of Richard E. Guggenhime.)

of its articles, that was pursuant to the—was that the corporation's code or the civil code?

A. That was pursuant to the provisions of the Corporation's code.

Q. Of the State of California at that time?

A. Yes, Mr. Dinkelspiel. [117]

Q. Then there was a voluntary liquidation, was there not? A. Yes, Mr. Dinkelspiel.

Q. Of Rosenberg Bros. & Co.?

A. Yes, Mr. Dinkelspiel.

Q. And that was done in the manner provided by the corporation's code of the State of California?

A. Yes, Mr. Dinkelspiel.

Q. Consisting of an election to wind up and dissolve, payment of obligations, notice to creditors, and finally a certificate of dissolution.

A. It was done pursuant to the corporation's code.

Q. I was just trying to summarize it. That is approximately so, is it not? A. Yes, sir.

Q. And as a part of that proceedings, there vested in Rosenberg Bros. & Co., Inc., a Maryland corporation, pursuant to the law of the State of California, that is, all of the assets of Rosenberg Bros. & Co., whose name was changed to Roberg Liquidating Co.? A. Yes, sir. [118]

* * *

Q. Subsequently, for matters of record, of title, there were conveyances, and my next question is directing your attention to Exhibit 1, which is a

(Testimony of Richard E. Guggenhime.)

bill of sale, and conveyance, is that the transfer made as a part of the liquidation that you have just testified to of Roberg Liquidating Co.? [119]

A. Yes, sir.

Q. And it so indicates, does it not?

A. Yes, sir.

Q. And there were similar documents with reference to the real property?

A. Yes, sir. [120]

* * *

DWIGHT K. GRADY

was called as a witness on behalf of the plaintiff, sworn.

The Clerk: Please state your name, your address and your calling to the Court.

A. Dwight K. Grady.

Q. Spell your last name?

A. G-r-a-d-y. 846 Divisidero Street, Fresno, California. I am the chairman of the board of the California Fig Institute.

The Clerk: Thank you.

Direct Examination

By Mr. Dinkelspiel:

Q. What is your position with the California State Fig Institute, again, please?

A. I am chairman of the board of directors of the California Fig Institute. [122]

Q. How long have you held that position?

(Testimony of Dwight K. Grady.)

A. Since March 16, 1953.

Q. And prior to that?

A. I was vice president of Rosenberg Bros. & Co., Inc.

Q. I will ask you whether you have any connection or any connection with or any financial or other interest in Rosenberg Bros & Co., Inc., at this time?

A. None whatever.

Q. And what was the last time, if ever, that you had any financial interest in the company?

A. My services with Rosenberg Bros. & Co. terminated on March 14th, I believe, 1953.

Q. And since that time you have had no financial interest by way of salary, bonus, stock interest, or otherwise in that company?

A. Nothing of any sort at all.

Q. And you have no interest financially of any kind in this lawsuit or its outcome?

A. None whatever.

Q. You are appearing here pursuant to subpoena? A. That is correct.

Q. Mr. Grady, during the course of your duties with Rosenberg Bros. & Co., I refer you particularly to the year 1947, what were those duties?

A. Well, I was assistant to the president of the company [123] and my duties involved in a sense acting as the alter ego of the president. He was a man who confined himself pretty much to the commercial operations of the company. I handled government relations and labor relations, public relations, a great many questions of policy and the like.

(Testimony of Dwight K. Grady.)

Q. Who was that man?

A. Arthur C. Oppenheimer.

Q. And how long had you been in the same position with Rosenberg Bros. & Co.?

A. From April 1st, 1938.

Q. Until your leaving the company in March of 1953?

A. My duties were substantially the same throughout the entire period, but in 1947 I was made a vice president of Rosenberg Bros. & Co.

Q. 1947? A. Yes.

Q. What part of the year, do you recall?

A. In the fall.

Q. In the fall. Now Mr. Grady, you weren't elevated to that position on account of this contract, were you?

A. No, I don't think that had anything to do with it.

Q. Mr. Grady, what was your occupation before going to Rosenberg Bros. & Co.?

A. Well, I was vice president and manager of the Dried Fruit Association of California for a period of almost 17 years [124] prior to joining Rosenberg.

Q. Where was your principal place of business?

A. The Dried Fruit Association main offices were in San Francisco. It also had an office in Fresno.

Q. Did that deal, as the name implies, in dried fruits?

(Testimony of Dwight K. Grady.)

A. Yes. It was a trade association made up of, oh, better than 95 per cent of the processors of dried fruits handling an even greater percentage of the tonnage of dried fruits produced in the State of California.

Q. As I recall, you had a lot to do with arbitration in those days, is that right?

A. Yes. One of the functions of the Association was to operate an arbitration service for the settlement of contractual disputes between buyers and sellers.

Q. Have you had any period of service on government or industry committees?

A. Well, I have served on most of the industry committees having to do with government since April, 1938. Such committees as the Advisory Committees of the Office of Price Administration under the War Food Administration and administrative committees charged with the responsibility of administering market orders which resulted from marketing agreements directly between the industry and the Secretary of Agriculture.

Q. Are you, in your own opinion, familiar with the dried fruit industry and its various [125] problems?

A. Yes. It is my opinion that I am familiar with its problems.

Q. And included in the word "dried fruit" as you use it, are raisins?

A. Raisins are one of the dried fruits, yes.

Q. Have you had familiarity over the years with

(Testimony of Dwight K. Grady.)

the various government programs applicable to dried fruit or the dried fruit industry?

A. Yes, I think that I have had very close contact, participation, in most of those programs. Certainly all of the programs affecting the company with whom I was connected during that period.

Q. Now you have also served in a government capacity, have you not?

A. Well, for a short time during the war I worked in Washington, yes, with the War Food Administration.

Q. Now you say that you are familiar with all the Government programs that apply to your company. Is it fair to state that that would be with respect to all dried fruit programs applicable to California industry?

A. Yes, I would say that that included all of the dried fruit programs and the edible tree nut programs that were carried on. [126]

Q. What was and is the business of Rosenberg Bros.—

In this part of this examination, your Honor, and counsel, I am not trying to distinguish between the two companies in my questioning. If any question should arise, I stand open to correction on that.

A. Rosenberg Bros. was a processor and packer of dried fruits and nuts and honey, and at that time it also was a dealer in beans and a miller of California rice.

Q. And has business in various locations?

(Testimony of Dwight K. Grady.)

A. Oh, yes, it does business in all of the Pacific Coast area where these products are grown. For example, prunes and filberts are produced in Oregon as well as in California. The company had a number of processing plants in both Oregon and California.

Q. Now, if you will pardon a primer question. What are raisins?

A. Raisins are grapes with the major part of the moisture removed from them by drying in the sun or in the case of certain special varieties by dehydration.

Q. Do raisins generally constitute an important part, quantitatively, of the grape crop?

A. Yes. Under normal circumstances up to a million tons of grapes will be converted into raisins. However, raisins are the residual of the grape crop, outside of certain special varieties. [127]

Let me put it this way, the normal production of grapes in California will range between two and a half million tons and three million tons. Of that we can normally expect 500 to 600,000 tons of grapes will disappear in the form of fresh shipments, shipped in both intra and interstate commerce.

In recent years, not less than a million tons, under normal conditions, frequently a million two hundred thousand tons of grapes will be converted to wine by crushing.

The balance will wind up in grapes made from the Muscat, Thompson and Sultana variety of grapes.

The latter type grape, particular Muscats and

(Testimony of Dwight K. Grady.)

Thompsons are also in demand for table consumption and may be converted into wine and are converted into wine usually.

And one of the economic problems of the grape industry is that interchangeability of raisin variety grapes into the other channels.

Q. What is the name of the grape usually converted into raisins?

A. Well, the greatest variety is the Thompson Seedless grape, and it produces the major volume of raisins. There are, however, raisins known as Muscat raisins which are produced in some——

Q. Our case has to do with the Thompson Seedless, so we do not have to go further.

Where are raisins grown in this country? [128]

A. Well, substantially—only in the State of California.

Q. Only in the State of California?

A. That is right.

Q. So any national program having to do with raisins would necessarily be restricted to California, is that correct?

A. That's correct.

Q. Will you explain, please, how the crop develops—I mean, when is it capable of being delivered?

A. Well, you mean as grapes or as raisins?

Q. As raisins.

A. Raisins ordinarily—the determination as to the production of raisins, as a physical matter, commences to shape up in early September in any nor-

(Testimony of Dwight K. Grady.)

mal year. The grapes are placed on trays in the vineyards—paper trays as a rule—and they are permitted to dry.

The laying of grapes will proceed for a matter of two or three weeks depending upon the will or the whim of the individual producer and his decision as to how he intends to dispose of his grapes.

The proceed to dry, and, as they say in the industry, they will begin to raisin at that time; following which, they are picked up, rolled up in rolls or in a biscuit type roll with the papers surrounding them, and they are put in what we call sweat boxes, and the name is a correct name because the raisins are permitted then to go through a curing process that is known [129] as a sweat; and when they have completed this sweat in any proper handling of them, they are then available for delivery to the packer who buys them, takes them in, stores them, stems them, grades them, processes them, packs them in the usual course of his business.

Q. In the ordinary course of a packer's business, when would the raisins be first available for physical possession?

A. Well, usually about the last week in September and from there on through October, November, until they are finally delivered by growers who individually produce them——

Q. Pardon me.

A. ——to the packers for his handling and disposition.

Q. Prior to the last week in September is there

(Testimony of Dwight K. Grady.)

apt to be any volume of raisins available to packers for delivery?

A. No, they aren't ready for delivery in any volume. In fact, in years when there has been a fairly good clean-up of stocks of raisins, usually there is a speeded-up effort to try to get in those first early raisins for early delivery into a market which is bare and wants raisins.

But there are two things that might be said. First, they are not usually in suitable condition for processing and shipment, except in very limited quantities;

And, second, growers do not usually like to sell, generally, until they have boxed their raisins and know that they have a crop to sell. [130]

Q. What is the status of the raisin when it is acquired by the packer? I am referring particularly, say, the Rosenberg Bros. & Co. Is it in sweat boxes?

A. Yes, sweat boxes. Sometimes in picking boxes.

Q. But it is after it has gone through that sweating process; is that correct?

A. Yes. It is the effort of the company to acquire only well cured raisins. On occasion they will get raisins that have not completed the sweat and are therefore what we call too heavy and they have to be redried or additionally dried.

Q. But the raisin you seek to acquire is the natural raisin?

A. That is correct, in the sweat box.

Q. In the sweat box.

(Testimony of Dwight K. Grady.)

Then what remains to be done before that raisin can be delivered to various markets?

A. Well, the raisin must be put through stemmers which knock off the stems and cap stems to some extent.

Then they go through recleaners which knock off the final cap stems and wash the raisins; from there they go into containers, commercial containers.

Q. What is meant by a packed processed raisin? What is that?

A. A packed processed raisin would be a raisin which has the stems removed, has been thoroughly washed and cleansed, perhaps graded for size, although that isn't a necessary requirement, and packed in a commercial container for [131] shipment.

Q. And there is, as the result of that preparation work, a difference in the price between the natural raisin and the packed processed raisin?

A. Yes. Formally you have to figure that a stemmed raisin is the result of a shrinkage of approximately six per cent from the vineyard run raisin. That means if you got 2,000 pounds of raisins from a grower you would get about 1,880 pounds of stemmed raisins out of that.

Q. So you have a six per cent shrinkage factor. In addition to that you have all these processing costs?

A. That's right. You have direct labor costs of handling, processing, grading and so forth. You have packing material costs. You have supervision

(Testimony of Dwight K. Grady.)

costs, and factory overhead costs, and then the general costs of doing business, which are administrative.

Q. Acquisition and hauling?

A. Oh, yes, the cost of buying the fruit.

Q. Have you——

A. And hauling are chargeable to the cost of the fruit, in addition to the price paid to the grower.

Q. Is there in your company a pretty well recognized differential in dollars that is between the natural raisin, the cost of the natural raisin, and the cost of the packed processed raisin?

A. I believe you mean in the practice of Rosenberg Bros.? [132]

Q. Yes, pardon me, Rosenberg Bros. & Co.

A. From time to time costs are ascertained by accounting methods, because changes in labor costs, material costs, and the like, have place in determining what the costs are. But at that time and at all seasons before and since that time the costs of packing, total costs of packing, have always been ascertained and worked out on the basis of rounded figures, to make computation easy.

Q. What are those figures?

A. Well, in this particular year?

Q. Are you talking about '47 now?

A. Yes, I am talking about '47. At that time our rule of thumb cost figure was, say, $40 figure for a direct, indirect labor cost, cost of acquisition, and factory overhead, material.

Q. So that a sale of the packed processed raisins,

(Testimony of Dwight K. Grady.)

Thompson Seedless at $150 a ton, for example, would require a purchase of $110 per ton to come out even?

A. Well, that's—you have over-simplified it.

Q. I know that.

A. That is the relationship, yes.

Q. Now Mr. Grady, still on the more or less general subjects. We have heard considerable about going short and long and closing contracts and what-not in the opening argument of counsel.

I want to ask you, please, to tell his Honor what the [133] ordinary and usual methods of contracting for raisins were as pursued by the packers in the year 1947 and thereabouts, various kinds of contracts? [133-A]

A. Ordinarily the packer goes out, tries to ascertain the growers' ideas and buys raisins on firm contracts. He gets what we call the feel of the market by ascertaining by offers to sell the attitude of buyers, and his aggressiveness in buying or his lack of aggressiveness in buying or also in selling are determined by the freedom which he is able to buy or sell.

That becomes a testing of the atmosphere of trade, if you might call it that.

If he finds that the trade is anxious to buy and producers are not anxious to sell, or if producers believe that markets are going to go higher but want to get their fruit under cover, they may deliver to a packer or the packer may offer to take the fruit under an open price contract.

(Testimony of Dwight K. Grady.)

When an open price contract is made, it contains the identical terms and conditions that a firm price contract would contain, with the exception that no price is named.

Firm price contracts are what their title implies, contracts at a price.

Now the price payable upon delivery of the raisins and acceptance of the buyer of those raisins. The open price contract carries a condition that the prices to be mutually agreed upon between the parties as of a named date, and if not so named, shall be the price ruling seven days thereafter, meaning the market price ruling seven days thereafter.

Q. That is whose price as of that date—— [134]

A. It is market price.

Q. The market price?

A. Most contracts provide market price. There have been packers at one time or other who put in their own price, the price they themselves were paying, but under the arbitrations that I have referred to, it has always been held that the market price—that is the market price, because——

Q. If you don't agree on a price as of the closing date, the seller has a 7 day period within which to accept another price?

A. No. The rule is that if the price is not agreed upon at or prior to the terminal date, then the price shall be the price ruling seven days thereafter.

Q. When the price is fixed, does that open contract then assume a different characteristic?

(Testimony of Dwight K. Grady.)

A. Well, it becomes a closed contract, and usually another contract is issued to replace it at the specified price.

Q. Just so we may know the whole story, Mr. Grady, you have described an open contract which becomes a closed contract? A. Yes.

Q. You have also described a contract which is closed at the time it is made, in other words a fixed price contract? A. That's right.

Q. Is that correct? A. Yes. [135]

Q. In determining your position, the position of Rosenberg Bros. & Co. with respect to whether it was long or short of raisins, what type of contracts were considered?

A. Well, a long or short position would be determined by the raisins actually under control of the packers.

Q. That means price determined, does it not?

A. Yes. That does not mean necessarily, however, that the prices have been set at that time. Prices could be higher or lower than the position at any given moment. If you have open contracts that are subject to some later date of closing.

Q. You consider those raisins in control?

A. Yes. Because all raisins that are contracted are under the control of the buyer to the extent that they are in existence.

Q. It often happens, does it not, that nature will interfere in the production of raisins—weather will turn bad, rain or something of that kind?

A. Not often, but it has happened. It has hap-

(Testimony of Dwight K. Grady.)

pened in a couple of spectacular years that I recall, where there has been serious crop damage after the fruit was laid down on the trays.

Q. So the control of the packer is not very important in situations of that kind?

A. No, the control of the packer is important to the packer because usually when he contracts he makes some advance to the [136] producer to assist him in financing his harvesting operations and therefore he wants to be sure that he controls them by having the right in his contract, first, owning title, and, second, to entering upon the possession of the producer making sure the fruit when made is delivered to him.

Q. Are there contracts that guarantee a certain price?

A. At times contracts are made that become, by their effect, guaranteed prices, and an advance will be made at so many cents a pound and a future—any rise in price guaranteed on that basis as [137] well.

* * *

SHERIDAN DOWNEY

called as a witness on behalf of the plaintiff, sworn.

The Clerk: Senator, will you just state your name for the record, please?

The Witness: Sheridan Downey.

Direct Examination

By Mr. Dinkelspiel:

Q. Senator, you are an attorney practicing law?

A. Yes, sir.

Q. Former United States Senator?

A. Yes, sir.

Q. In 1947 were you a Senator from California?

A. Yes, sir.

Q. And in 1948 as well? A. Yes, sir.

Q. Now, Senator, did you interest yourself at any time in the year 1947, in the situation affecting the raisin industry of California? A. I did.

Q. And do you recall when the situation of that industry was brought to your attention, approximately when?

A. About October 1st, 1947. [143]

Q. Is there some event that fixes that in your mind? A. Yes, very definitely.

Q. What was that event, please?

A. Well, at about that time there was a meeting of the raisin growers in the Central Valley, in the Fresno Auditorium, at which the Auditorium was packed (it holds 5,000 people and the crowd was out into the streets), and it was a very unhappy tumultuous meeting.

(Testimony of Sheridan Downey.)

Q. That was a meeting of raisin growers, is that correct? A. I did not understand.

Q. That was a meeting of raisin growers?

A. Of raisin growers, yes.

Q. Not packers?

A. No, packers had nothing to do with that.

Q. Was that a meeting that Mr. Setrakian took a part in?

A. Yes, Mr. Setrakian was the head of the Committee or the raisin growers. He was a very articulate, aggressive individual, and he had contacted me to interest me in presenting the claims of the raisin growers back in Washington, and I had agreed to attend this meeting in Fresno.

Q. Did this request of you have anything to do with a program that had been previously announced by the Secretary?

A. I learned, from conversations with the Commodity Credit Corporation and other individuals, sometime before that that the Commodity Credit Corporation had stated that the Corporation [144] would purchase only 60,000 tons of processed raisins during that season.

Mr. Wolkinson: May I please object, respectfully, to the testimony, "Commodity Credit Corporation had stated," and may we please have, if the Court will approve, the person who made the statement on behalf of the defendant? I think it is hearsay and objectionable in the form in which it is stated.

(Testimony of Sheridan Downey.)

The Court: The answer may be withdrawn subject to a foundation being laid.

Senator, do you recall the conversations which preceded that information?

The Witness: Yes, your Honor. I say that was the salient fact around which everything evolved, everybody knew that, that the Commodity Corporation had made a program to purchase 60,000 tons. That was in the press, everybody knew it.

I just stated, to make it legal, that, of course, in my discussions that took place later with the Commodity Credit Corporation that was the very basis of our discussion. There was no dispute about that. That is what all this trouble arises out of [145]

* * *

The Witness: Well, I had many discussions with the growers of raisins. They were generally small men, averaging only about 10 acres, and they stated to me, and their statement was verified by members of the Farm Bureau, experts at the University, and so on; that under the plan of the Commodity Credit Corporation to purchase only 60,000 tons of raisins there would be left about 60,000 tons more hanging over the market, that it would demoralize the market, it would creat chaos, and I formed the opinion that most of the growers, who were restricted to raisins at least, would go broke and become in exceedingly financial difficulty if the program to purchase was limited to the 60,000 tons.

So I informed Mr. Setrakian, and I informed

(Testimony of Sheridan Downey.)

this meeting at [146] Fresno, that I would fly back to Washington. As I recall, Congress was then—had adjourned over the year, I think, and I was engaged out here to—on work relating to reclamation and irrigation, from which I hated to divert, but this matter was so urgent and affected so tragically so many thousands of raisin growers that I agreed to go back to Washington and concentrate on this.

So I did go back to Washington for discussions with the Commodity Credit Corporation.

Now let me preliminarily say, I probably had several conversations every day with somebody in an official position relating to this program. I probably had three or four discussions with the Board, Commodity Credit Board, in formal sessions headed by Jess Gilmore, who was the Chairman. One of the members who was there and very active and I might say very sympathetic, was Cy Smith, who sits here in the courtroom.

Mr. Smith, as I recall, was then head of the Marketing Division of fruits and vegetables, and Mr. Gilmore stated in his presence and in the Board meeting that if they had followed Mr. Smith's judgment and bought 120,000 tons instead of the 60,000 tons all this difficulty would have been avoided.

Mr. Smith, who is here in the courtroom, throughout the meetings supported very sympathetically my position.

Another man who was active back there was Dave

(Testimony of Sheridan Downey.)

Davidson, who is now dead, who was a Californian. He was with the Triple [147] A and also a member of the Board, and I counseled with him a great deal.

Now, I was well prepared, in supporting statements from the independent agricultural sphere, as to the calamitous effect that this program would have upon the raisin industry and indirectly upon the grape growers; and probably in the course of two or three or four days the Commodity Board indicated in formal session that they had—that they acceded to the arguments that I was presenting.

Q. (By Mr. Dinkelspiel): Now, senator, let me interrupt you just a second.

Did the Commodity Board or any member thereof tell you what objections there were, if any, to acceding to your suggestions?

A. Yes, Mr. Dinkelspiel.

But we first past over the hurdle as to the calamitous features of this program and they were finally accepted, and I don't want the Court to think it was my persuasive power. I think by the time I was back there the Board already fully realized that this was sadly mistaken policy.

And when that was finally accepted, then, Mr. Dinkelspiel, answering your question, the argument was presented:

But, senator, this Board has solemnly and firmly made representations that its whole buying program will be limited to 60,000 tons, and under the [148] representations that that is all we are

(Testimony of Sheridan Downey.)

going to buy we have secured very favorable and low bids from packers. No, senator— — [149]

* * *

A. So the question was presented there in informal meetings with individual members of the Commodity Corporation and with them in formal meetings, that here the Government was in possession of very favorable low bids for the production of processed raisins and that if the policy of the Government was changed and 60,000 additional tons were taken out of the market, that would necessarily materially increase the price of raisins.

As a matter of fact, I might say to counsel, that was the very purpose of buying the additional 60,000 tons, was indirectly to increase the price of raisins, and it was stated there and recognized there, if I may use that expression not improperly, that if the Government acceded to what we were asking and announced the program to purchase 60,000 [150] tons additional, the packers would be faced with heavy deficits because the market undoubtedly would fluctuate, being stated there in that meeting that the packers had sold on futures, had entered into contracts to contract to deliver these raisins, but not actually in possession of the raisins, and had acted upon the assumption that the policy enunciated by the Commodity Credit Corporation would be continued in effect.

Well, I immediately suggested to Mr. Kimball or Mr. Gilmore:

(Testimony of Sheridan Downey.)

I don't see there is any difficulty there. I think it can be cleaned up in 30 minutes.

What do you mean?

Well, take your 'phone down and tell the representatives of the packers if they want to that you will release them from contracts, since they were made upon these representations that won't be true, and start all afresh. Well, he looked rather skeptical. He said:

Well, Senator Downey, it isn't as simple as that.

I said:

Well, it seems to be so.

He said:

No. We have to deal with the Secretary (who was a very able and a very careful business man). Secretary [151] Anderson is very happy over this contract which we have got with the packers and he doesn't want to let the packers out and we will have to get his consent to do this thing. And (he said) so there is that difficulty.

Well (I said) it is a very simple matter for Secretary Anderson to recognize the equities of the packers, and a wrong would be done if they would be held to their contracts, and he can do it in 30 minutes.

Well, I guess he didn't deny that.

So I think it was stated by all of the people there, certainly by Mr. Gilmore as representing the Board, and by Mr. Cy Smith, that any attempt to hold the packers, if the Government should change its policy, would be totally inequitable and unfair. I was not

(Testimony of Sheridan Downey.)

particularly interested in that phase of it. I was representing the raisin growers and not the packers. Frankly, I wasn't worried at that time what would happen to the packers. I was worried about what would happen to 10 or 15,000 small farmers out in the Sacramento Valley.

Q. (By Mr. Dinkelspiel): In fact, they accused you of high-pressuring for those farmers, didn't they, Senator?

A. Well, may I take recourse under the Fifth Amendment, your Honor? (Laughter)

The Court: You said the Sacramento Valley or the San [152] Joaquin Valley?

The Witness: Yes—the Central Valley. I understand that over the whole valley we have about 10,000 raisin producers, and I believe we produce all of the raisins that are produced in the United States.

Well, at the end of seven or eight days the Board finally called me in in formal session. I can well remember Mr. Smith's smiling face, who had, I thought, very sympathetically supported the cause of the small farmer, and I was informed that the Commodity Credit Corporation would announce in the very near future change of program and purchase 60,000 tons of raisins, and so it just felt like a heavy weight rolling off my shoulders and I felt a great sense of exhilaration. And then something that was said radically calmed me down. It seems to always happen like that:

Well, Senator, you understand this is our recom-

(Testimony of Sheridan Downey.)

mendation or perhaps authority, but it is subject to ratification by the Secretary.

So immediately I began to sweat again. But then they laughed and said:

Well, Senator Downey, you can really consider this closed. This is an unanimous decision of the Board to buy this 60,000 additional tons, and so far, out of many, many cases, the Secretary has never refused to abide by the unanimous recommendation of the Board. [153]

Well, that immeasurably relieved me, and I flew out to California to take up my other duties. And a man always likes to be the bearer of good news, never a bearer of bad news, so I communicated to the raisin growers and everybody was very happy.

Well, two or three days passed and about one o'clock one night, and I think it was in the Biltmore Hotel, I received a message from somebody, some messenger of evil, who told me that Secretary Anderson had revoked the right of the Board to buy this additional 60,000 tons.

As I recall, I got that about twelve o'clock our time. I didn't sleep the rest of the night. I got Dave Davidson on the 'phone and verified the bad news. I waked him up at his home about four o'clock Washington time and I talked to two or three other people, and Dave Davidson told me that in his opinion it would be useless for me to communicate with Secretary Anderson and the only possibility of now winning out on this was to go

(Testimony of Sheridan Downey.)

over his head and go to the President of the United States.

So I contacted one of my secretaries in Washington, I suppose around one or two o'clock our time, three hours later there, and asked him to endeavor to make an appointment for me to talk to the President of the United States as early as possible the following morning.

Now if counsel will bear with me, if I may wander a minute [154] here. I know there was some deadline. That was very important. Mr. Cy Smith will know what it is. Unless the matter was favorably cleaned up that very day, why, it would be too late.

I think perhaps what it was, the Board was going to receive additional bids from the packers and — anyway, I know there was some deadline, and I was under a very heavy nervous burden, and finally at six o'clock in the morning, out here, nine o'clock back there, why, I was told the White House is on the line and put Senator Downey on. [155]

So in all great event the wires were cleared, persons never talked to the President, has to be there and waiting, and so the President's voice came in, "Hello, Sheridan, have you got a lot of trouble for me out here?"

I said, "Not for you, Mr. President, but there are 10 or 15 thousand desperate people back here that may be broke if they don't have your action."

Of course he was reluctant and skeptical at first, told me, of course, he always wanted to rely on his Cabinet members, and I told him it was the unani-

(Testimony of Sheridan Downey.)

mous decision otherwise of the Commodity Credit Corporation, and of course, that I very much respected them, and at the end of 15 minutes greatly to my relief, President Truman said, "Well, Sheridan, don't worry about it, we'll see the 60,000 tons are purchased."

And shortly after that the Commodity Credit Corporation did issue the order for the 60,000 tons.

Now, I have no idea what the President did or what happened after that. I am just stating what I know.

So that completed the transaction largely as far as I was concerned.

Now I want to say this: I was indirectly and rather inconsequently a part of many additional negotiations that happened after that in the controversy that developed between the packers and the Government. [156]

* * *

A. (Continuing): Your Honor, and to counsel, while I remember in a general way the salient items of this controversy thereafter so far as they affected my office, I don't categorically remember the dates and the documents, and that sort of thing.

But a year after this had transpired, that is, in the fall of 1948, I was working here in the St. Francis—Sir Francis Drake Hotel, and Mr. Grady confacted me and asked me if I would have any objection to giving him a letter [157] stating the facts of this controversy, if that is what you want to call it, as I knew them to be. He wanted to perpetuate that

(Testimony of Sheridan Downey.)

for a claim or something he was filing against the Government. I told him I would consider that a proper request and I would be glad to do it.

And I met with my secretary, a Mrs. Smith, and with Mr. Grady, and I prepared a letter that I have here in my hands categorically reciting the facts as I knew them to be at that time.

It would be difficult for me now—well, it would be impossible for me now to go back and restate those dates independently. Should I——

The Court: Yes, I think—counsel, have you examined this letter?

Mr. Wolkinson: I should like to see it.

The Court: Certainly.

Mr. Dinkelspiel: Counsel has seen the letter, your Honor, but he is entitled to see it again, of course.

Mr. Wolkinson: *I didn't know what letter,* he didn't announce the date.

The Court: Have you examined a copy of the letter?

Mr. Wolkinson: I saw a copy of this letter this morning, and previous to this. I just wanted——

The Court: That letter, Senator, was written in the fall of 1948 under the circumstances related by you, relating [158] to the past events and chronically in brief summary some of the events leading up to the acquisition or purchase by the Commodity Credit Corporation of the additional 60,000 tons as well as the other related facts?

The Witness: Yes, your Honor.

The Court: All right, sir.

(Testimony of Sheridan Downey.)

The Witness: The letter now is on my son's stationery, and it is dated September 30, 1948.

The Court: You wish to offer this letter?

Mr. Dinkelspiel: I do, yes, your Honor. Going to ask a question first, and that letter, as his Honor asked you correctly reflected your recollection as of the time of its writing of the facts therein stated?

The Witness: That is correct, Mr. Dinkelspiel.

Q. (By Mr. Dinkelspiel): And you have no reason at this time to dispute or change those facts?

A. Oh, no. I am sure that this is an accurate and objective statement of what happened.

Mr. Dinkelspiel: I would like to offer it in evidence, your Honor, and in doing so—this will be Plaintiff's 2—in doing so I call attention to the fact that everything after October, starting with October 16, relates probably more to a defense—well, it shows what happened between the packers and Senator Anderson—Senator Downey and [159] others.

* * *

Cross-Examination

By Mr. Wolkinson:

Q. Well, Senator Downey, if the Court will permit me to say by way of introduction, after the impressions I have formed of you I ought not to cross-examine you, because they are certainly very high, sir. A. Thank you, sir.

Q. And I am certainly happy for the privilege of meeting you in this way. A. Thank you.

Q. Senator Downey, were you an agent in the

(Testimony of Sheridan Downey.)

employ, and please don't take any offense at this. this is for the record in the defense of a client that I am privileged to have as my duty to defend: were you an agent in the employ of the plaintiff during any of the time that you negotiated with the Secretary Anderson after the program was announced, that is, in your capacity as lawyer, or in your capacity as—lawyer?

A. No, sir. And with the consent of his Honor and counsel I would like to make this statement: that when I became a United States Senator I had a rather large and lucrative law practice in the trial of cases. I totally abandoned that and I abandoned all the legal connections of every kind. I never received a single legal fee or any other sum of money from anybody while I was Senator. [171]

Further than that, my brother has a large practice in Sacramento and my son over in Oakland, and they both agreed with me that they would refrain from taking any cases involving Federal matters in which I might have any influence or activity.

So I just wanted to state that categorically for the sake of the record, and I might, if your Honor would allow me, and maybe I am just getting old and garrulous, but I consider myself in the nature of an ambassador from California to the Sovereign Government, and it was my duty to present the petitions and claims and difficulties of our people back here, including the Republicans along with the needy Democrats.

Q. The reason I said that, your Honor, and the

(Testimony of Sheridan Downey.)

Court has been gracious enough to allow a certain leeway here, I think both to counsel questioning and to you, sir, in answering, as well as in giving your statement in your own way.

I asked that question because it has relevancy to the admissibility of this document——

A. I understand, sir.

Q. ——and possibly others. If you were an agent, then I couldn't object to certain points, because then you were authorized by a client to go and talk to certain people.

A. I recognize the relevancy of the question and of course, sir, I am glad that you asked it as part of your duty.

Mr. Dinkelspiel: I suggest to the Court that that does not go to the relevancy, to the question of relevance, that [172] employment does not, you don't have to be employed to represent someone, you can be a United States Senator and represent someone without employment, counsel.

Q. (By Mr. Wolkinson): Well, I therefore now ask you whether you were an agent, since you are a lawyer you know what the meaning of that term is, or a representative in an agent's capacity during the time that you went to Secretary Anderson and had conversations with him concerning the alleged claim here in suit?

A. Well, that calls for some legal definitions that are rather beyond me. If I can state the facts, counsel, I would like to do it.

(Testimony of Sheridan Downey.)

Q. Let me put it this way ——

A. I certainly was in no sense an agent or an attorney in that I was paid by them or doing anything except what I conceived would be my duty as a Senator. I did have a keen sense of responsibility here because I did to the limit used my political power and whatever persuasion I had to change the program of the Government.

Q. I wasn't speaking of the program, sir.

A. Well, I know, of course, that would be disastrous for the packers unless, of course, they were released from their contract or otherwise adjusted. In the sense that I represented, well, tens of thousands of citizens and organizations of California, as a matter of fact I represented them. Now, I [173] wouldn't think that in any way constituted me any agent or anything, but you're a much abler lawyer than I am.

Q. Oh, no, I'm not.

A. Don't ask me, that is too difficult an art for me.

Q. As I see it, your Honor—Senator; as I see it, there are two things here, and I want to address myself first, if I may, to the issues of this action which are two contracts and to the damages alleged to be flowing therefrom.

So may I ask you, in view of what you just said whether at the time that you went, personally or by telephone, to speak to Senator Anderson to cancel the contracts or to have them renegotiated, whether at that time Rosenberg Bros. & Co., asked you to

(Testimony of Sheridan Downey.)

do it in their behalf without pay as their Senator and as their, shall I say, mouthpiece, for the honor, prestige and influence which your presence would command.

A. Oh, yes, Dwight Grady, and later Mr. Ehrlich almost wept tears as they contemplated this heavy loss for their company, and asked me to do everything as I could as United States Senator to adjust their equities as they and as I, counsel, believed they should be adjusted. Oh, yes.

Q. Didn't Mr. Grady ever, alone or with any other person lay on the table in front of you the facts which you, as a lawyer and as a citizen and as a responsible official could look at, examine, and then form an independent conclusion as to whether they suffered any damage as a result of these [174] contracts?

A. Well, I never examined any financial statements or any particular records. Now, Mr. Grady told me his company would lose three or four hundred thousands dollars and my discussions with Secretary Anderson was that an adjustment should be made to the extent of their losses, but, counsel, I had no direct knowledge of what those losses were. I didn't—I never even, I didn't personally know about the dealings. Under all the circumstances that the Federal Government ought to make whole the packers for whatever losses were incurred by them, because of the change of the program.

Q. Did you, Senator Downey, take their alleged

(Testimony of Sheridan Downey.)

claim of three or four hundred thousand dollars loss on faith as they orally stated it to you?

A. I believed from what Mr. Grady told me there was a loss of about that amount, and I certainly did ask, when I talked to Secretary Anderson, of course, I knew he is one of the ablest business men we have had in the administration would carefully scrutinize their claim and if they have exaggerated their claim, why, he would bring it down.

Q. Now, assuming, Senator, that you knew at the time that Mr. Grady and Mr. Ehrlich presented their claim, and, as you say, almost in tears to you, assuming——

A. That is an exaggeration, excuse me. That was figurative, counsel. [175]

Q. Oh, I will withdraw that. I thought you meant it in some earnestness.

A. Oh, no, I didn't.

Q. Assuming that at the time they presented the claim to you first—first, when was that, approximately?

A. Well, soon after, say, around October 15. I have the dates on——

Mr. Dinkelspiel: You wish to refer to your letter? I am sure counsel would not object.

The Witness: I think I had better, counsel, because I know you want as precise an answer as possible.

Mr. Dinkelspiel: It is an exhibit in evidence.

The Witness: Yes.

(Testimony of Sheridan Downey.)

Well, now, refreshing my recollection, your Honor, from this letter which I wrote and filed and know expresses my belief as it existed as of the date of the letter, about October 16, Mr. Grady presented to me a statement setting forth the losses that had been incurred, according to him, by this change of program, and the damages which he said his company had sustained as a result. That is about October 16.

Q. (By Mr. Wolkinson): Now, did Mr. Grady, at that time, looking at your exhibit, say that he estimated his losses were approximately $300,000?

A. Well——

Q. His firm's losses, I beg your pardon. [176]

A. I am not sure that as of that time. I didn't particularly impress that upon my mind. I know Mr. Grady and Mr. Ehrlich during the course of the conversations with me told me the losses would be about three or four hundred thousand dollars on this transaction, and if I recall, brought about—contracted to sell about 14,000 tons, and there was a loss of about $30 a ton, according to their claim because of the increase.

Q. About $420,000, if my arithmetic is correct?

A. Yes, counsel, but I never scrutinized that, I never questioned that, I felt very definitely that the great Federal Government in fairness ought to make good for whatever loss would be accrued through their change of program. I felt that.

Q. Provided, of course, you must have felt also that the processor who was appealing for your aid,

(Testimony of Sheridan Downey.)

and was appealing for you to use your great office and your persuasive powers on another great man, a Cabinet official, assuming that you were persuaded, that that gentleman or the firm had had losses?

A. Well, of course——

Q. That is—— A. Well, of course——

Q. That is all based assumption?

A. Why, of course, if Rosenbergs didn't have any losses because of this change of program, why, there wouldn't have been any damages, of course.

Q. Now, assuming, Senator, that October 16 Rosenbergs had as [177] yet purchased not a ton of merchandise, or raisins with which to fill the Government contracts, can you, in the light of all you know of this situation see any loss that they could have suffered at that time? October 16.

A. Well, they have contracted with the Government to deliver at a certain price and the Government changed its program, increased the price of raisins about $30 a ton.

Q. In other words, it was at that time in your judgment a potential loss, assuming delivery under the contract?

A. Counsel, I would assume so, yes.

Q. Yes. Now, do you know when was the next time, if this letter helps you to refresh your recollection, sir, Mr. Grady came to you with any more information and facts concerning his losses which he said flowed for his firm from these contracts?

A. Well, when I was out here in California, your Honor, we did have meetings, attended, per-

(Testimony of Sheridan Downey.)

haps, by representatives of the Farm Bureau and Grange, and I think the head of the Raisin Growers Association and some of the industrial leaders, including Mr. Grady, and the whole matter was discussed; and it was the consensus of that meeting, of those meetings—of course, the Government representatives weren't there, they were one part meetings—that the packers should be reimbursed for whatever they would have lost, whatever they would lose because of the change of program. [178]

Q. When did those meetings take place?

A. I would say in later October and early November, probably had three or four of them. I can remember that there was one at the Fresno Hotel in Fresno at which the head of the Raisin Growers Association was prominently there. I can remember a meeting at which the Executive Secretary of the Farm Bureau Federation sat in. All of these conferences, which it was clearly assumed that the packers were caught out on the limb, that this change of program had very much affected the prices that they had to pay and would lead them into serious deficit on the operations if they had to make good.

Q. Now, Senator——

A. I can't testify to that, counsel. I don't know and I don't want to say anything to you that I am not sure of. That was the assumption, and the only thing I suggested to Secretary Anderson as to what ever extent they had been damaged, and I don't

(Testimony of Sheridan Downey.)

think Secretary Anderson would have ever done anything more.

Q. Do you recall Mr. Grady bringing to your attention the fact that the Government in the month of October had sent a notice to Rosenbergs requesting delivery of a portion of the raisins, a million pounds or so, and that Mr. Grady's firm had replied that there was a complete stoppage of movement of raisins into the Fresno plant and they could not make delivery? Did he bring that to your attention at any time? [179]

A. Counsel: I don't know. I have that rather uncertain impression, if you want it, that because of the change of program there was a question of how badly exhausted the market would be. That made it a seller's market, and then, the small growers, instead of being in despair, they couldn't sell, were holding out to get as high a price as they could, and it wasn't possible then with any ease to make contracts with the growers. But now, whether Mr. Grady told me that, I don't know. I think the market was rather chaotic for several weeks in there, and I think what you indicate in your statement was probably true.

Q. But you don't recall if he brought to your attention that they informed the Commodity Credit Corporation that they were not going to deliver the raisins because they had none to deliver in October? That you do not recall?

A. No, I can't specifically recall that.

Q. Now, in November, if you spoke to Mr. Grady

(Testimony of Sheridan Downey.)

in November or anybody else in behalf of the plaintiffs, did Mr. Grady or plaintiff's representatives or officials bring to your attention the fact that notices to deliver were sent to them of these raisins and they had replied again that they could not obtain raisins and hence were not going to make delivery, again due to chaotic conditions? Was that brought to your attention?

Mr. Dinkelspiel: Of course, your Honor, these questions are assuming facts not in evidence, and I don't know whether [180] they even fall within the latitude of cross-examination. I am going to object to the last question on that ground.

Mr. Wolkinson: May I urge that counsel has taken this witness out of turn?

The Court: The objection is overruled.

Mr. Dinkelspiel: Your Honor wish to take a recess at this time?

The Court: Yes, I didn't note the time. Is this a convenient time, counsel?

Mr. Wolkinson: I would like the answer, first.

Q. (By Mr. Wolkinson): Please tell us the answer.

A. Well, during this period of time I know there were discussions with Mr. Cy Smith and Dave Davidson, and Secretary Anderson as to the possible release of the packers from the contracts. I did know that the packers did not physically possess the raisins.

Q. And you knew that because, was it because Mr. Grady told you so?

(Testimony of Sheridan Downey.)

A. I am sure he told me that, that was implicit in all the conversations. [181]

* * *

Q. (By Mr. Wolkinson): Well, we have it then, that during the various times that you interceded with the Secretary and others of the Commodity Credit Corporation on behalf of Rosenberg Bros. & Co., you did not have brought to your personal attention facts and figures presented to you by the firm from which you could form an independent judgment and conclusion as to whether there was any damage suffered by the firm; is my understanding of that correct?

A. Well, counsel, I am not sure that it is: Mr. Grady did state to me there would be a loss of three or four hundred thousand dollars. He did tell me that they had sold to the Government around, I think, fourteen thousand tons and that due to this change in program there would be an increased cost of them of about $30 a ton, and that that would cause them a heavy loss.

That was his representation to me, counsel. I didn't try to scrutinize it. I don't know whether it was accurate. I believe Mr. Grady is a man of integrity and business stability and I assumed what he said was true. But I didn't scrutinize it. That wasn't my duty anyway.

Q. I understand. Either then or at any time subsequent in the year '48

A. No, counsel. I don't. I know this, that

(Testimony of Sheridan Downey.)

Secretary Anderson is not only probably the best versed man in [183] agriculture, maybe in the whole United States and in Washington, but he is also a very able business man, and whenever Secretary Anderson reached the point of working out whatever was the just damages to this company, which he told me he thought they had, why, of course he wouldn't allow them anything more than he thought they were entitled to.

Q. Did it come to your attention——?

I don't know what prompts me to say "your Honor."

Did it come to your attention——

A. I consider that a much higher honor than to be called Senator.

Q. Did it come to your attention, sir, that Senator Anderson had communicated to Mr. Grady at or about the time in February, 1948, that Mr. Grady was conversing with you to make a second or third or fourth effort to intercede, that he doubted seriously whether any loss was suffered by Rosenberg Bros. & Co. as a result of the change in program insofar as those contracts were concerned?

A. No, counsel. Senator Anderson certainly never stated that to me.

Q. Did Mr. Grady say to you that he said it to him and did he in turn say it to you?

A. I am sure not, counsel.

Q. Now to get back to the program with which you were directly concerned. [184]

A. Yes.

(Testimony of Sheridan Downey.)

Q. ——on behalf of 10 or 15,000 growers, as you testified.

First, your interest in behalf of the producers. Is it a correct statement of the facts when I say to you, sir, that this program was contemplated, promulgated and instituted to benefit the producers?

A. Yes, surely.

Q. Was there any thought in your mind when you were laboring as mightily, as you recited, to have an increase of purchase, that the processors were also within the contemplation or reach of the benefits to be derived from the program?

A. Well, counsel, that calls rather for a political conclusion. We have an agricultural program that is inevitably supposed to benefit the farmer, but through many, of course, all the vast segments of our society, the storekeeper, the man who sells the manufacturing instruments, certainly the packer and the canner—— [185]

Q. Now, the program you say as announced caused the producers to bring you here or to suggest that you come here to attend a meeting?

A. To Fresno.

Q. To Fresno. Did you have any conversation with Mr. Grady shortly after that meeting?

A. I can't.

Q. On behalf of the firm.

A. I can't remember any with Mr. Grady until after the Government had changed its program.

Q. In view of the latitude that has been allowed [illegible] sir, in your direct statement, may I ask you

(Testimony of Sheridan Downey.)

this question, would you say from your knowledge of the producers and the packers [189] and the trade, all of whom you represented, would you say that the packers were well aware of the fact that the producers in the early part of September wanted a much higher price for their product than $110 a ton?

A. I just don't know about that. I don't know.

Q. Well, what is it that you learned from that meeting, if you could give it to us in a sentence, what did the producers want?

A. I learned from that meeting and discussion with other aggicultural leaders that in view of the normal outlets for raisins and the amount of the crop that was to be expected that the purchase of 60,000 tons of processed raisins would be wholly insufficient, that it would still leave an additional 60,000 still hanging over the market, and that would tend to depress the whole market.

Q. What was the date of that meeting, if you remember?

A. About October 1st. I think that date is correct. In Fresno, do you mean?

Q. In Fresno.

A. Yes, I think October 1st.

Q. October 1st?

A. And it is all in—it would all be in the Fresno papers.

Q. Did you have any conversation with Mr. Grady after October 1st, within a day or two there-

(Testimony of Sheridan Downey.)

you were asked to make felt with [190] Commodity Credit?

A. I can't recall any, counsel, until after the program was changed. If I may indulge in a little boasting here, I think practically everybody had given up on any fight or attempt to get the Government to increase its purchase program completely. Stimulated by the yells and cheers and jeers of 5,000 people that were going to be hungry and broke if they didn't get it, I thought—I think everybody just assumed that the Commodity Credit Corporation said:

> Well, here, we are going to purchase 60,000 tons of raisins and that's it, boys. There's going to be nothing more.

Now Mr. Setrakian and representatives of the growers had been back there pounding at the door of Mr. Smith, here, and of the Commodity Credit Corporation, and they had been unsuccessful. I don't want to speak in derogation of any representatives but the representatives from Fresno, the Congressional Representatives, they all had failed, and the definite, final announcement by the Commodity Credit Corporation was that "It's 60,000 tons and that's all."

Q. Now the pressures were to break that dam, if we may call it such, were they not, and you were the spokesman of those loud pressures, is that right?

A. That's correct.

Q. Was it known to the processors, I mean

(Testimony of Sheridan Downey.)

Rosenberg—that [191] you were such a spokesman at about that time? A. I don't know.

Q. When you learned around the 8th or 9th of October that the Commodity Credit Corporation board, and I think that's what you said, had voted unanimously to increase the purchases as you had requested or had suggested, did you communicate that fact to the Rosenberg firm or anyone else in that firm? A. Oh, I can't——

Q. Or any of the officers of that firm?

A. Oh, I can't remember that. It was announced in the press, I think, and I announced it to the committee, and of course, it went like wildfire all over the valley. I suppose that Mr. Grady knew about it immediately. I don't know how he couldn't have known about it.

Q. So around the 8th or 9th of October you believe——

Mr. Dinkelspiel: Now wait a second, counsel. Don't mislead the witness. He has testified about the 10th or 11th of October and don't put in 8th or 9th. I suggest you ask the witness about proper dates.

Mr. Wolkinson: I suggest that you leave out "mislead" or any other characterizations. I am sure you don't mean it.

Q. Senator Downey, at the date that you testified when unanimous decision was reached to change the program, that information conveyed by you, or your secretary or associates [192] in your office to Rosenberg?

(Testimony of Sheridan Downey.)

A. Well, I have no recollection of that. I don't think I would have conveyed it, counsel. I can't recall of any contact with Mr. Grady or Rosenbergs as of that time. All of my work up to then was with the producers, and probably along the 8th or 9th or 10th of October I telephoned out, I assume, to Mr. Setrakian that it was the unanimous judgment of the Commodity Credit Corporation to change the program and purchase the 60,000 tons.

Q. What was that date? I missed it.

A. Well, I think the Board formally agreed with me that they would change it on October 8th. It might have been the 9th. And maybe that day or the next day I reached Mr. Setrakian and told him, giving him the good news, which proved to be premature, because Secretary Anderson wouldn't accept the recommendation or the authorization of the Board.

Q. Did Mr. Grady at any time in his discussion with you on behalf of the firm, when he first met you, indicate to you that Rosenberg, following the announcement of the original program, went out into the field through its buyers and bought raisins at a price in an effort to help the successful running or execution of the program as originally announced?

A. Well, I think, and again counsel, my recollection is not distinct. I think Mr. Brady did tell me that they had purchased some small amounts of raisin to fulfill the contract for the [193] Government, and then he later told me that he felt the

(Testimony of Sheridan Downey.)

Rosenbergs could not in good faith hold the growers to that price in view of the increased price due to the 60,000 additional purchase.

Q. Did he indicate to you that those purchases were quite insignificant? A. Yes, he did.

Q. When was that, when did he make that indication, sir?

A. Well, that wasn't until after, maybe in the latter part of October or November, approximately. I don't think that I came in contact with Mr. Grady about that at all until the foul deed was done, as far as the packers were concerned, because finally I realized what would happen if the Government said, all right, we are going to take 60,000 more tons, it was perfectly obvious that the packers, who had bought upon the assurance of the Government that there would be only 60,000 tons, would be caught in a tough spot. I knew it and they knew it. I mean, everybody knew that. It was perfectly obvious.

Q. Now Senator Downey——

A. Now, what the legal rights are or what category I was in, in my status I don't know, but that whole thing was obvious, counsel.

Q. Now, you say upon the assurance of the Government. I wonder, as a lawyer, whether you could give me a little more [194] specific information on that. Did any of the packers—I mean did the Rosenberg firm, through Grady or anybody else, indicate to you at any time that they bought on

(Testimony of Sheridan Downey.)

any representation other than a contract which they made with the Government?

A. I don't know what Mr. Grady's statement on that was to me. Mr. Jess Gilmore said to me, and I think also Mr. Smith and the other members, one reason they were very reluctant to make this additional purchase is because the Board had represented to the packers that this was the final purchase and on that representation had secured a low and economical bid from the packers.

Q. Mr. Smith said that to you?

A. Mr. Gilmore said it, and I think also Mr. Smith acquiesced in it. But I know Mr. Gilmore said it. And they all, all the Board members, including Mr. Smith, who is here in the court, knew that the packers would have to take a loss if the Government went out to further raise the price, it was perfectly obvious, and I think they all knew that the packers relied upon the statements made by the Board—at least the Board told me that—and that was one of the hurdles that I had to get over.

Mr. Gilmore was saying to me:

Yes, Senator, but look here. You think this is simple, but we have got these very valuable [195] contracts. We represent the United States. We are trying to save money, and Secretary Anderson is trying to save it, and we have got these economical contracts upon the basis of our representation we would only buy 60,000 tons. Now if we buy 120,000 tons, the price necessarily goes up.

(Testimony of Sheridan Downey.)

Well, that was implicit in it. Well, that's the thing I wanted. [196]

* * *

Q. Can you tell the Court today that there was anything other than good faith and decency and honor and propriety, insofar as you saw it unfolding before your eyes, of the development of the program called a price support program?

Mr. Dinkelspiel: Now wait a second. I object, if your [197] Honor please, as calling for something incompetent, irrelevant and immaterial, as unnecessarily waving the flag and asking this witness to whitewash all of the dealings of the Department of Agriculture. It is not within the issues of this case.

Mr. Wolkinson: One of the strong issues is good faith, I think.

A. Your Honor, I know a lawyer makes a poor witness. I would like to answer the question.

Mr. Dinkelspiel: Go ahead. I withdraw my objection.

The Court: You may answer it, Senator.

A. Let me say this. I had the highest respect and admiration for the members of the Commodity Credit Corporation. They were a fine body of men. I have for Senator Anderson, whom I know intimately and well, and did have. But since you ask me this question, counsel, on the basis of the facts that I know, I could not understand why, as a matter of simple business judgment and honor somebody just didn't take the phone down and say

(Testimony of Sheridan Downey.)

Well, we have increased this program beyond what you were led to expect. We know you can't fulfill these contracts with profit to yourself, and we release you.

Why, the Government would want to hold onto those contracts, why they would want to hold onto them when nobody had done anything that prejudiced the Government—the Government was in identically the same position as a result [198] of the change of its program that it had been. I don't understand.

Now let me say this. Certainly I am not judging Secretary Anderson or the members of the Board, but I would say that if I had been dealing, representing clients under the facts as I knew them, I would say in good faith and decency: You have led these men into this and now I think that you ought to release them from the contracts.

Now I don't want to criticize Secretary Anderson or the members of the Board. I don't know why they didn't do it. Looking back on it, we would have saved months and years of argument and discussion. I don't know why.

Q. That which you have voiced is your opinion as a lawyer? A. What is that?

Q. What you have just voiced is your opinion, sincerely arrived at I assume, as a lawyer and as a businessman and as a man of judgment.

A. Well, in whatever capacity you want to assign me.

Q. That is your opinion.

(Testimony of Sheridan Downey.)

A. That was my opinion.

Q. Based upon the facts as you knew them.

Suppose, sir, you had been at that time the Secretary of Agriculture, as Senator Anderson was, observing him under the pressures that he was working, one of them being to save the taxpayers as much money as he could because [199] Congress had to make appropriations for the expenditures of the program, and had you arrived at that time at exactly the decision of Senator Anderson, that Senator Anderson did, that at first, as you have indicated, and I am assuming the facts, that he could not and would not change the program, would you say that if you were he at that time that your decision would have been prompted by ill will or lack of good faith?

Mr. Dinkelspiel: Your Honor please——

Q. (By Mr. Wolkinson): Have I made that question clear?

A. Counsel, I think I can answer——

Mr. Dinkelspiel: Go ahead, Senator.

A. I certainly assume that Senator Anderson acted in good faith and honesty, and all members of the Board did. I don't think they reached the right conclusion. Now I wouldn't have stated this if you hadn't asked me.

Q. (By Mr. Wolkinson): I understand. Your conclusion differs from their conclusion, as you have indicated, and I understand you.

A. I don't think it differs from the members

of the Commodity Credit Corporation as they expressed it to me.

Q. But it differs from the Senators?

A. From the Secretary. Mr. Gilmore and the members of the Board acquiesced that if this additional purchase was made, it necessarily—and was made for the purpose of increasing the price of processed raisins, and the Rosenbergs [200] having bid upon the representation of the Government that there would only be 60,000 tons produced, they should be released from their contract. Now that was their opinion to me at that time. I wasn't specially interested in it. They were making their argument to me:

But, Senator, we have got to get over this hurdle of having these contracts.

Well, the obvious thing: why not release them? And there was no, no denial on their part that the packers would suffer as a result of having bought these under a different assumption.

Mr. Dinkelspiel: Sold them under a different assumption.

I would like to ask a question if you wish to correct that having bought them under a different assumption. You mean having sold them under a different assumption.

The Witness: That's right. I beg your pardon.

Q. (By Mr. Wolkinson): Assuming, Senator, that Secretary Anderson honestly believed at that time that no such representations had been made to Rosenberg upon which they could honestly, fairly

(Testimony of Sheridan Downey.)

rely, and had reached the conclusion, which he did reach, different from yours, was there anything about that conclusion which you can impugn so far as motive is concerned?

A. Well, if your Honor—if I may answer that question, this way, I had several telephone calls with Secretary [201] Anderson, and I spent one complete hour, that I distinctly remember, in his office discussing this, and Secretary Anderson indicated clearly, although reluctantly, reluctantly but clearly, that he thought an adjustment should be made. The last time I saw him I spent an hour with him and he told me his position had not changed, that an adjustment should be worked out, but he said his Solicitor had advised him that in order for an adjustment to be worked out a claim would have to be filed and go through certain legal formalities. [202]

Q. Did he also indicate to you an adjustment to be made which you indicated he said he would recommend would have to be based upon a showing that there was damage?

A. Oh, that was implicit in the whole thing. I mean, whatever the damages were, because of the increased prices, because of this change of program would be recouped or they would be released from their contract.

Q. Let me ask you this question, sir: Assuming that you, as a Senator, which you then were, had it brought——.

A. I hate even to assume on the Senator, it brings my ulcers back.

(Testimony of Sheridan Downey.)

Q. Assuming that facts had been brought to your attention which you then believed and which were unavailable to you at one time, but which were later brought to your attention to this effect, that Rosenberg anticipated making a kill on this contract and acquiring the raisins way below $110 a ton and reaping a very high profit at the expense of the producers, what would your decision then have been with respect to going to the Senator to urge an adjustment? [203]

* * *

The Witness: I remember the question. If, as a matter of fact, the Rosenbergs were seeking what might be termed an excessive profit in this transaction, while, as a good Christian I might lament the avarice of the human heart, which is pretty difficult to prevent, I don't think, counsel, that that should affect the question here at issue, and that question is: Were the Rosenbergs led to enter into a certain contract with the United States Government to sell processed raisins rather cheaply upon the basis there would be only but sixty thousand tons bought and thereafter the Government changed to a hundred and twenty tons. I still think, even though the gentleman may have been seeking to make killing that you speak of, which I know nothing about, and Mr. Dwight Grady will speak [206] at considerable length, I still think they are entitled to whatever their legal rights are. [207]

* * *

DWIGHT K. GRADY

recalled as a witness on behalf of the plaintiff, previously sworn.

The Clerk: Mr. Grady, please restate your name for the record.

The Witness: Dwight K. Grady.

Direct Examination
(Resumed)

By Mr. Dinkelspiel:

Q. Mr. Grady, you were testifying at [267] the close of yesterday's transaction with respect to open contracts and closed contracts, do you recall?

A. Yes, sir.

Q. And I asked you certain questions as to what constituted a long or short position with respect to, let's say, open contracts; and would you explain again, if you will, when you consider in your business that you are long or short of say raisins on an open contract, that is, where price has not yet been fixed?

A. A position in which sale exceeded firm purchase contracts at a price, would be a short position. In other words, the long or the short position that is significant in a business operation of this kind is a position where the known cost of raisins is at least matched by the known sales. That would be an even position.

Where the firm sales exceed firm purchases, then a short position exists.

(Testimony of Dwight K. Grady.)

And conversely where purchases at the firm prices exceed sales, a long position exists.

The significance of the long or the short position is a financial significance.

Q. In other words, it depends upon whether at the time of your commitment to sell you have a firm price commitment to buy?

A. That is correct. [268]

Q. Whether or not your position is long or short?

A. Yes, that's right.

Q. So if it appears from the evidence——

This is just preliminary, your Honor——

If it appears from the evidence at the time Rosenberg Bros. & Co. entered into certain contracts with the Federal Government, with Commodity Credit Corporation, that you obligated yourselves under those contracts for more raisins than you then had under contracts with prices fixed to buy, your position would be short or long?

A. It would be short.

Q. It would be short.

Now, Mr. Grady, I think we have discussed the open contracts and the closed contracts. And did you also testify yesterday to two occasions when bonuses were offered for raisins?

A. Well, it is customary in some years when supplies in the hands of packers are low and they are anxious to get early deliveries from producers of cured raisins, that they offer a bonus of a quarter of a cent or a half a cent a pound in order to induce those raisins to come quickly into their

(Testimony of Dwight K. Grady.)

possession to meet their own shipping requirements.

Q. I think you testified yesterday that occasionally advances are made to the growers on contracts. Is that so?

A. Yes. When growers are in need of money, they will come [269] in to a packer and ask for a loan. That loan is secured by a note and by a contract which leaves the price open for later determination and the contract is security for the note.

Q. Is it true that raisins are what are known as fungible products?

A. Yes, I would say generally that raisins of a like variety and condition are fungible.

Q. And that would be true say of natural Thompson Seedless?

A. Yes, generally that would be true.

Q. And what do you mean by fungible, just by way of explantion?

A. That they are mixable to produce a homogenous pack.

Q. And you can dip into the barrel and satisfy one contract as well another in the general run of things?

A. Yes, it is customary for these thousands of producers to produce raisins of a like kind and quality since they are all in the same general area of production and growers produce anywhere from very small tonnages, one or two or three tons, up to very large quantities. These raisins come in from, as I say, thousands of growers to the packers,

(Testimony of Dwight K. Grady.)

and when they are run through stemmers the individual identity of each grower's delivery is lost because the raisins are blended together to make the required packs.

Q. Well, was it the practice of Rosenberg Bros. & Co. in the year 1947 or thereabouts to buy specific raisins against [270] specific contracts?

A. Well, no, not in the sense of the fungibility of the raisins. Quantities of raisins were bought to fill existing commitments.

Q. In other words, you had commitments that consisted of a series of contracts, is that correct?

A. Yes, sir. We might have contracts with bakers and with wholesale grocers and with chain store operations and the like.

Q. And you would buy raisins of the character needed to cover all those commitments?

A. Yes.

Q. In the course of your seasonable operations?

A. What we call standard quality Thompson Seedless raisins of the given season. [271]

* * *

Q. He continued as active as before in the years '48, '49, '50, to the time of his death?

A. Right up to his death, he was the General Manager of Rosenberg Bros. & Co.

Q. And 1950, about the time of his death, was this particular claim, that is before the Court, then pending before——

A. Yes, we were pursuing every angle of the

(Testimony of Dwight K. Grady.)

thing in an effort to get settlement, including calling on high officers of the Government in Washington, and in preparing, I believe, at that time, to go through the Contract Disputes Board of the Commodity Credit Corporation, or we just had—I don't remember the exact date of that. [273]

Q. I will ask you this question, which is brought out by statement of counsel—is it true that, as stated or possibly only inferred by counsel, that Mr. Oppenheimer was not interested in pressing this claim?

A. I don't know that I quite understand the question.

Q. Was Mr. Oppenheimer interested or not interested in pressing this claim?

A. Of course he was interested in the claim. We were conscious of the very serious loss, greatly reduced return based upon our expectations of a reasonable operating year, and he was interested in our getting made whole for the loss, so sustained.

Q. Have you in the past——

The Court: Pardon me, Mr. Dinkelspiel.

What do you mean by being "made whole"?

A. Well, we had reason to expect that from the operation of the business—we knew that we had been seriously injured by the operations of this program.

The Court: How?

A. By an out-of-pocket loss in fulfilling these contracts, because of the higher prices that we had to pay in the field than we had expected to pay, growing out of a change in program.

(Testimony of Dwight K. Grady.)

Mr. Dinkelspiel: I was going to get to that, your Honor.

The Court: All right.

Q. (By Mr. Dinkelspiel): I will ask you, have you, you— [274] Rosenberg Bros. & Co.—and you personally, had dealings in the past with Commodity Credit Corporation? A. Yes, we had.

Q. And are you acquainted with the persons who have been and now are connected with that Corporation? A. Yes, I am.

Q. People like Mr. F. R. Smith? A. Yes.

Q. And others?

A. Yes, many others in the Department.

Q. Many others. And you are familiar with and it was part of your business to be, familiar with programs that have come out from the Department of Agriculture and the Production and Marketing Division and Fruit and Vegetable Branch?

A. Yes, that is correct. That was part of my duty, to be familiar with those things.

Q. And that extended over the years?

A. Yes, that is correct.

Q. Now I understood your testimony yesterday to be—that is, part of your testimony—that you participated in the industry meetings of various kinds in which matters affecting the raisin industry were gone into? A. Yes, sir. [275]

Q. Do you recall if there were any discussions or any such meetings in July of 1947, with respect to the 1947 raisin crop? A. Yes, I do.

Q. Did you participate in any such meetings?

(Testimony of Dwight K. Grady.)

A. Yes, I did. I participated in all of them.

Q. Do you recall particularly a meeting on July 25 of that year?

A. Well, I recall that there was a meeting following which on July 25 a statement was prepared of the economics of the grape industry which pointed up the potential surplus of raisins as a result of that survey.

Q. I will show you a mimeographed document entitled "Marketing Outlook and Conditions—1947 crop raisins" and ask you if you have ever seen that before?

A. Yes, I have seen it, and counterparts of it frequently.

Q. And what is that document?

A. Well, this is a document entitled "Marketing Outlook and Conditions—1947 crop raisins."

Mr. Wolkinson: May I register for the Government an objection to any further reading of the document unless an offer is made?

Mr. Dinkelspiel: I intend to offer it, counsel. I just wanted him to identify it first, if you don't mind.

Mr. Wolkinson: Excuse me.

Q. (By Mr. Dinkelspiel): How was it prepared, if you know, [276] and by whom?

A. The information was drafted at a meeting participated in by representatives of the grape industry, including the raisin segment and the grower and vintner segment, and economists, Mr. Warner Allpendinger of the Production and Marketing Ad-

(Testimony of Dwight K. Grady.)

ministration, and Mr. S. R. Shirer of the Giannini Foundation for Agriculture Economics, to whom had been assigned or they had been requested to make an economic analysis of the matter, and then in collaboration with the members of the industry a breakdown of the expected utilization of the three million ton crop estimated to be the crop for 1947, which wound up with an estimated potential production on a conservative basis of 325,000 tons, and a balance representing the surplus of raisins of 100,000 tons. These figures were based upon a hopeful expectation with respect to sales of raisins in the domestic market and for export requirements, disappearance also on an optimistic basis. [277]

* * *

Q. What was done with this mimeograph, in the way of its distribution?

A. Copies of it, copies of the report were sent to interested parties, including the Fruit and Vegetable Branch in Washington, D. C., the local office of the Fruit and Vegetable Branch in Berkeley, and to members of the industry that were interested.

Q. And, Mr. Grady, I believe you testified that a Mr. Warner Allmendinger participated in some of the preliminaries preliminary to the preparation of this report?

A. Yes. He was requested to and, so far as I know, did collaborate with Mr. Shirer in making an economic analysis of the factors that contribute

(Testimony of Dwight K. Grady.)

to the sale of raisins, purchasing power and things of that character.

Q. And Mr. Warner Allmendinger was and is—was, rather, then an economist of the Fruit and Vegetable Branch of the Production and Marketing Division of the Department of Agriculture with offices in Berkeley, isn't that correct?

A. That is correct, yes. [278]

* * *

Q. (By Mr. Dinkelspiel): Mr. Grady, I hand you a mimeograghed document and ask you if you have seen that or any counterpart of that before?

A. Yes, sir, I have.

Mr. Dinkelspiel: And that is a document—it is Exhibit A to the complaint, your Honor, and is entitled "Secretary Anderson announced dried fruit program."

Q. (By Mr. Dinkelspiel): I will ask you when you first saw that or a duplicate of that?

A. Of this particular document?

Q. Well, the contents of that document; yes.

A. I saw the contents of this document in the newspaper September 6, in San Francisco.

Q. And did you at any time receive a duplicate—withdraw the question. Did you at any time receive a counterpart of that document?

A. Yes. A few days later, in the mail I received a copy of the document.

Q. In the mail? A. Yes, sir.

(Testimony of Dwight K. Grady.)

Q. And you first heard of the announcement in the newspaper, is that correct?

A. On the morning of September the 6th.

Q. And subsequently you received a counterpart of it? [281] A. Yes, sir.

Q. By you, I mean Rosenberg Bros. & Co.?

A. Yes.

Q. To your attention or to your company?

A. Yes. Just to the company. I receive it. [282]

* * *

Q. (By Mr. Dinkelspiel): Mr. Grady, to paraphrase a lighter moment, Damon Runyon once said when the day began a year ago, I am going to ask you when you last testified, it seems like a couple of days ago, you stated that you received this exhibit 4, a copy of it, sometime subsequent to September 5, 1947? A. That's correct.

Q. And that you had received information with respect to its contents on or about September 6, I believe? A. That's correct.

Q. Now, this document, without going into it, as it has been thoroughly discussed, announced the program, is that correct?

A. That is correct.

Q. Of the Department of Agriculture?

A. Yes, sir.

Mr. Dinkenspiel: Now, Mr. Wolkinson, I assume that that program was entered into a docket of the Commodity Credit Corporation in Washington, D.C., and I will ask you if you would be so kind and

(Testimony of Dwight K. Grady.)

pursuant to a demand previously made upon [307] you, now confirmed, to produce that document so that his Honor can see what transpired with respect to putting this program into effect.

It is Docket OC-95a in the Department of Agriculture.

Mr. Wolkinson: I will first produce the document, and then I will make my objection to it. [308]

* * *

S. R. SMITH

called as a witness on behalf of the plaintiff, sworn.

The Clerk: Please state your name, your address and your calling to the Court.

The Witness: My name is S. R. Smith. I live at 2845 So. Buchanan Street, Arlington, Virigina.

The Clerk: And your calling, your occupation, professional calling?

The Witness: I am Director, Fruit and Vegetable Branch, Production End Marketing Administration, United States Department of Agriculture, Washington, D. C.

Direct Examination

By Mr. Dinkelspiel:

Q. And did you hold that position, Mr. Smith, in 1947, particularly in July, August, September and October of that year?

A. Sir, I didn't hear the first part of your question.

(Testimony of S. R. Smith.)

Q. Did you hold that same position back in 1947? A. I did.

Q. Just to make this short, Mr. Smith, was it customary before embarking on a purchase program of a commodity to draw up a docket setting forth the proposals and the reasons therefore?

A. It was.

Q. And was such a docket drawn up in 1947 known as Docket OC-95a?

A. There was, sir. [317]

Q. And I hand you a series of documents presented to me by Senator Anderson, formerly Secretary of Agriculture, and ask you if that is the docket which was then drawn up and maintained relating to the raisin program?

A. Mr. Counsel, as your question was asked, my answer—my answer to it would require certain delineations or differentiations. The docket originally acted upon by the Board in the attachments there to up through the opinion of the Acting Solicitor signed by Mr. Edward M. Shulman under date of August 26, constituted the original or the program as originally acted upon by the Commodity Credit Corporation and the acting Secretary of Agriculture. The documents subsequent to that relate to amendments to the original docket.

Q. And are part of the docket?

A. For the entire season. [318]

* * *

(Testimony of S. R. Smith.)

Cross-Examination

By Mr. Wolkinson:

Q. Mr. Smith, did I hear you correctly—I was on the other side of the room, I may not have heard you well—did you state that the Acting Solicitor whose signature appears to be Edward M. Shulman, it is not signed, but it is mimeographed, and this sheet of paper is dated August 26, 1947, containing an opinion by him, did you say that that was a part of the docket? A. Yes.

Q. Was this docket a public document?

A. No, sir.

Q. To your knowledge in due course of business did you have occasion to submit this and other dockets proposing programs to the Board of Directors of CCC? A. I did.

Q. Did the Board then consider this docket, that is, your proposals, as embodied in a docket or series of pages called a docket?

A. Yes, they did.

Q. Did they then act upon the program? [319]

A. They did.

Q. As you submitted it? And did they sometimes accept and sometimes reject your proposals as embodied in a docket?

A. That is correct, sometimes they accepted and sometimes they rejected or modified the proposal.

Q. In this instance did you submit a program

(Testimony of S. R. Smith.)

called a document which was exactly as the one that was approved?

A. The Board of Directors made some changes in the original submittal.

Q. And this docket which has been referred to as a docket is the docket that they approved after eliminating or adding or amending the docket or program that your originally made up?

A. That is correct.

Q. And finally, to your knowledge was this docket, dated on the 26fh and approved September 9, and approved by the Acting Secretary of Agriculture on September 11, ever disclosed to the press or to the processors or to the producers or to any other person other than the Board?

A. To the best of my knowledge it was not.

Q. And was it customary and was it in due course of business and in pursuit of rules and regulations and procedures of the Department to maintain and keep and preserve the secrecy of these programs within the Department?

A. The rules and regulations require that they be maintained on a restricted distribution basis and only those authorized [320] to receive them can receive and have access to them, and they are not, by regulation and rule, considered to be a public document, they are considered an internal operation document.

Q. And to your knowledge did the Rosenberg Bros. & Co., or the other processors, have access to this docket or any of the documents pertaining

(Testimony of S. R. Smith.)

thereto prior to the time that the bids were offered in the form of an offer of sale on September 17 and later the second one, October 7, or thereabouts, 1947?

A. From my knowledge I would say that I knew of no one in the dried fruit industry or processor having access to that document, or a duplicate of it. [321]

Q. And if it should appear in this trial that Rosenberg Bros. & Co. did have access to some or all of the information in this document through any source, would you say that that was extraordinary and in violation of the rules of the Department?

Mr. Dinkelspiel: It is contended, your Honor, that Rosenberg Bros. had access to the document, it is only we had access to the program which was announced as a result of the docket. I object to the question as going beyond the bounds of cross-examination, and not within the issues of the case.

Mr. Wolkinson: I shall stand on the answer, unless the Court——

The Court: The answer may stand.

Mr. Wolkinsoff: You may answer. Did you understand the question?

A. I am not sure. I would like to have it read back.

Mr. Wolkinson: Would you kindly read the question?

(Question read by reporter.)

A. The information contained in such a docket,

(Testimony of S. R. Smith.)

anyone having access to it is not authorized to disclose it to people on the outside.

Q. (By Mr. Wolkinson):- And is that in order to maintain proper and effective public relations and standards of impartiality to all producers and all processors and the [322] trade generally?

Mr. Dinkelspiel: Object to the question as incompetent, irrelevant and immaterial.

Q. (By Mr. Wolkinson):- Did you understand that question?

Mr. Dinkelspiel: Object to it as incompetent, irrelevant and immaterial, not within any issue of this case.

The Court: I would think so, counsel; however, you may answer.

Q. (By Mr. Wolkinson): Did you understand that question?

A. I want to make sure that I understand it.

Mr. Wolkinson: Would you please read it?

(Question read by reporter.)

A. For the most part I could answer that question by saying yes. I would like to add that most dockets acted upon by the Commodity Credit Corporation Board set limits within which operations are actually conducted. The specific action may or may not exactly coincide with the maximums or limitations in a docket, so that anyone having access to the docket would have more information than what is made available generally.

Q. (By Mr. Wolkinson): And, as far as you

(Testimony of S. R. Smith.)

personally know, did anyone subject to your supervision make any disclosure out of this docket or the recommendations prior to its adoption to anyone, producer or processor or otherwise, as far as you know today? [323]

A. To my best knowledge and recollection they did not.

Mr. Wolkinson: That is all. I object to it——

Mr. Dinkelspiel: Wait a second——

Mr. Wolkinson: Oh, I am sorry.

Mr. Dinkelspiel: I want to ask the witness a couple of questions.

Redirect Examination

By Mr. Dinkelspiel:

Q. I think I must have misunderstood you, and I don't want to have any misunderstanding here, Mr. Witness, I handed you a series of documents which we have referred to as the docket?

A. Yes, sir.

Q. Is that a proper designation?

A. That is a proper designation.

Q. Now, you answered to Mr. Wolkinson's question with respect to any changes made and recommendations by your superiors, or the Board, sometimes your recommendations were not agreed to in toto, is that correct? A. That's right.

Q. Now, any changes in this program that is reflected by the docket would appear in this docket, would they not?

(Testimony of S. R. Smith.)

A. I would answer you this way, Mr. Counsel: that any changes made by the Board had been incorporated in the document which you have. [324]

Q. Is your answer yes, then, please, to my question?

A. Well, I thought I answered your question, sir.

Q. I would like a yes or no answer, please, and then you can explain.

A. Then I would like for you to read it.

Mr. Dinkelspiel: Will you read the question, please?

(Question read by reporter.)

A. If I understand your question properly the answer is yes.

Q. (By Mr. Dinkelspiel): Thank you. One further question: The docket itself was not disclosed, I understand, to processors or growers: that's your testimony, is it not? A. That is correct.

Q. Processors and growers were advised of the program which the docket contemplated, were they not?

A. The original docket as passed and subsequent amendments that were made to the original docket were made, that is, certain information contained in the original docket and amendments thereto was made known generally in the form of a press release.

Q. That is made known generally in the form of a press release: that is correct, is it not?

(Testimony of S. R. Smith.)

A. That is correct.

Q. And that included, did it not, a purchase of a maximum of 133,000 tons of dried fruit, including 61,000 tons of raisins? [325]

Mr. Wolkinson: Just a minute——

Q. (By Mr. Dinkelspiel): Care to look at the docket and refresh your recollection?

Mr. Wolkinson: I object to the question in the form it was given on the ground that the press release, which is in evidence, speaks for itself, and it asks this witness' characterization of it, and I object to it on that ground.

Mr. Dinkelspiel: All right, I will withdraw the question and accept counsel's stipulation that the press states what was in the program. That is all.

Mr. Wolkinson: I do not stipulate.

Mr. Dinkelspiel: Then I will ask the question.

Mr. Wolkinson: I do not stipulate anything. You have a document in evidence——

Mr. Dinkelspiel: Are you withdrawing your last statement, or are you standing on it that the press release states what the maximum quantities——

Mr. Wolkinson: Would you let me finish?

Mr. Dinkelspiel: Yes, if you let me ask the question, first.

Mr. Wolkinson: First, I am not your witness; second, I would like to finish answering what I said. There is in evidence an exhibit, Plaintiff's Exhibit 4, and what that says is for this Court, in the present instance and circumstance, to decide. I merely objected to this witness giving [326] his opinion or

(Testimony of S. R. Smith.)

conclusions in law or otherwise as to what the substance of this press release, or as to any part thereof, is.

Mr. Dinkelspiel: Well, I will ask the question, your Honor, and I will reframe it in this way:

Q. I understand, Mr. Witness, that you have testified that information, certain information contained in the docket is released to the public and interested parties through press releases: is that correct? A. That is correct.

Mr. Dinkelspiel: May I have Exhibit 4, please?

Q. I will ask you whether the press release, which has been introduced as Exhibit 4, the announcement to the press, is one such press release to which your last answer referred?

A. It is.

Q. And subsequently is it not true that such matters as announcements under the docket or calling for bids will bear the docket number and refer to the program encompassed by the docket? So as not to mislead you on what I mean by the question, I am referring you to Announcement No. 1, September 10, 1947, which is an exhibit to the Answer on file herein.

I am asking specifically whether such an announcement, in accordance with practice, refers to the docket by number and identification of the program? [327]

A. It is my understanding as a rule that they do.

Q. Thank you, sir. [328]

* * *

DWIGHT K. GRADY

resumed the stand as a witness on behalf of the plaintiff, having been previously sworn, testified further as follows:

Direct Examination
(Resumed)

By Mr. Dinkelspiel:

Q. You have, Mr. Grady, in the course of your time on the witness stand testified as to your familiarity with Government programs in the industry with which you are connected and with the method of announcement of such programs.

May I have the exhibit, please?

The Clerk: Which one?

Mr. Dinkelspiel: I believe Exhibit 4—the announcement.

Q. (By Mr. Dinkelspiel): (Handing witness.) I show you now Plaintiff's Exhibit No. 4, which is the announcement of the Secretary with respect to the raisin program, and ask you whether that is, in your experience, a customary way of the Department in announcing a program?

A. Yes, sir, I believe it is.

Q. And you have seen such announcements in the past? A. Yes, sir.

Q. And you have read this, I take it, have you?

A. Yes, I have read it. [334]

Q. To your knowledge did the raisin industry in California consider this as a program of the Department or the Commodity Credit Corporation?

(Testimony of Dwight K. Grady.)

A. Yes; it did.

Q. For 1947 crop raisins?

A. That's right.

Q. It is a fact——

Just pardon me for leading on this——

It is a fact that this particular announcement is an invitation to packers to bid, as distinguished from growers?

A. That was an announcement declaring what the program would be and stating that packers would be invited to bid.

Q. And is a program of this character usually for the benefit of packers or for whom?

A. I understand it to be for the benefit of producers.

Q. How did you, as a representative of your company, Rosenberg Bros. & Co., construe the announcement insofar as any limit might have been imposed thereon, on the amount to be purchased?

A. I construed——

Mr. Wolkinson: I object to the question and to the answer on the ground that it is immaterial how he construed it.

The Court: Overruled.

The Witness: I construed the program to be an announcement of the Secretary's intent to buy 61,000 tons of raisins.

Q. (By Mr. Dinkelspiel): Any more than [335] that?

A. And I construed that as meaning the program would be insufficient to do the job that would

(Testimony of Dwight K. Grady.)

be beneficial to the industry, both because of the tonnage to be purchased and the way it was to be purchased.

Q. Have you heretofore testified whether in your experience and knowledge you understand the difference between a price support program and a purchase program?

A. I don't know that I have testified to that heretofore. But I do have ideas concerning it.

Q. Based upon your experience in the industry and with such programs?

A. Yes, that is correct.

Q. Will you state for his Honor, what the difference between those programs is?

A. Well, a price support program is one in which a price will available from the Government through a standing offer to purchase at such price all offerings of the particular commodity specified.

A purchase program is one that announces that a commodity will be bought and may either be on the basis of a specified price to producers or may be, as this one was, upon competitive bidding.

Q. And will you say, in the light of your experience, whether this announcement was an announcement of a purchase program or a price [336] program?

A. This was an announcement of a purchase program.

Q. In making that statement you are aware, are you, or are you aware, that it has sometimes been called a price support program?

(Testimony of Dwight K. Grady.)

A. Yes, I understand that it bears the title "Price Support Program."

Q. Now Mr. Grady, what if anything did you do on hearing of this program?

A. Well, on Saturday morning, September the 6th, when I learned such a program was announced, I called Mr. Irwin Graham in Washington, D.C., to protest about its insufficiency and the fact that it would not accomplish the intended purpose in my judgment.

Q. Who is Mr. Irwin—who was he at that time?

A. Mr. Irwin Graham is the head of the—I believe they call it the Specialty Crops Division of the Fruit and Vegetable Branch, and he is the subordinate of Mr. S. R. Smith.

Q. And that specialty branch is one that covers raisins, does it?

A. It covers raisins, yes.

Q. Had you known Mr. Graham before?

A. Yes, I had Mr. Graham for many years.

Q. And had dealt with him on programs in the past?

A. Yes. He was usually our first contact in Washington with respect to dried fruit programs, including raisin programs. [337]

Q. What did you tell him in that telephone conversation and what did he say to you, if you can recall?

A. Well, I told him that I heard of the program and read about it in the newspapers, and was it a

(Testimony of Dwight K. Grady.)

fact that that was the way the program was put up —was announced.

Q. And what was his answer?

A. His answer was that the program was announced from Albuquerque, New Mexico, and that he knew nothing about it beyond that.

Q. And did you comment on the program in any manner favorably or unfavorably?

A. I commented unfavorably to the effect that, first, the program did not announce the purchase of sufficient raisins to relieve the surplus problem in the raisin industry, and, second, that it contemplated purchasing those raisins on a competitive bidding basis, which would mean that the cheapest sellers would be awarded the business and that that would be depressing to the entire price structure of the raisin industry and do just the opposite of granting relief to the producers of raisins.

Q. And that it would not have the effect of benefiting the growers? A. That's correct.

Q. And did Mr. Graham say anything in response to your comments of that character?

A. No. Mr. Graham said that he had nothing to do with the [338] announcement, that it had been made from Albuquerque, New Mexico, and he was in no position to discuss it.

Q. And when you say that it was insufficient in taking up surplus, did you have any amount in mind?

A. Yes, I had the amount of 61,000 tons—was the amount of the purchase—and an agreed in-

(Testimony of Dwight K. Grady.)

dustry estimate that the surplus would be at least a hundred thousand tons arrived at on a conservative basis.

Q. What, in the light of your experience, is the effect of buying only part of a surplus and leaving some part of the surplus unsolicited for purchase?

A. The effect of a quantity of raisins available for sale greatly in excess of any possible estimate of disposition, that is, shipment, use, would have a price depressing effect on the market. In other words, unless a balance is established between supply and demand on a basis of reasonable expectancy and experience, the effect would be deleterious to the price structure and therefore to the growers who produce the raisins.

Q. And that was your opinion and so expressed immediately after receipt of this announcement?

A. It was my conviction.

Q. In the light of your experience in the industry? A. That is correct.

Q. And in talking to Mr. Graham, in reaching this conclusion, were you expressing the opinion of Rosenberg Bros., or your [339] associates in Rosenberg Bros.?

A. Well, at the time I talked to him I was expressing my own opinion. But since I was a member of the company, I felt sure that my authority permitted me to speak for the company.

Q. Did you at any time thereafter discuss the matter with Mr. Oppenheimer and others in your company?

(Testimony of Dwight K. Grady.)

A. Indeed we did. It was almost a matter of almost continuous discussion, expressions of disappointment.

Q. Did you express their concerted view upon the subject? A. Yes, I did.

Q. Did you talk to anybody else, if any, in the fruit and vegetable branch or in the Marketing Division or anywhere else in the Department of Agriculture about this time?

A. Yes. I talked with—well, I'm not sure of the exact time, but prior to the submission of the first offer to sell, I did talk with others in the Department.

Q. Do you know whether or not you communicated with Mr. Smith? I am talking verbally now.

A. I don't believe I talked personally with Mr. Smith on the telephone.

Q. Was there a man named Woody Myer in the Department?

A. Yes. I conversed with Mr. E. A. (Woody) Myer on at least one occasion and I believe more, and I also talked with Mr. Richard Burke, to whom I entrusted a message to be conveyed to Mr. [340] Myer.

Q. Without going into the details, what was the nature of your talks, the substance of it?

A. I—— [341]

* * *

The Witness: I had been discussing with Mr. Myer procedures under which he might make recommendation, because he was not an officer of the

(Testimony of Dwight K. Grady.)

Production & Marketing Administration at the time, he was a member of the Research & Marketing Administration, and I talked with him because I presumed that he was close enough to the Secretary perhaps to give a different viewpoint, and in my discussion with Mr. Myer he had understood the position that we took, that the program was insufficient, and he was discussing with me what the effects would be of immediately coming out with the announcement of an additional purchase of the second 30,000 tons in the 61,000 ton deal, under the theory that since there had been a sharp decline in the market following the announcement of the program which continued with the offer to buy or request for offers to [342] sell which showed that the market would fully decline to unwarranted low level from the standpoint of the intent of the program, and I called Mr. Burke to give him a message with respect to that idea, saying that I couldn't see that that would save the program, that the things that would improve the program would be either the naming of a firm price at which the packers would have to pay growers or an extension of the total tonnage with such a price, to remove the price depressing effects of the announcement. [343]

Q. You mentioned—as long as you have mentioned it we might consider that point now—this so-called two-stage purchase in your conversation with Mr. Burke and Mr. Myer. What was that?

A. Well, the first invitation to offer bids called for an offering of either 30 or 31,000 tons, roughly

(Testimony of Dwight K. Grady.)

half of the 61,000 tons purchase. That meant that if the Government were to stay within the limits of 61,000 tons, but to buy the entire quantity, there would be a second invitation to sell and that second invitation would encompass the remaining 30,000 tons which had not yet been—on which offers had not been invited. [344]

* * *

Q. (By Mr. Dinkelspiel): I ask you again, Mr. Grady, whether you did or did not communicate your views with respect to this program, or certain of them, in writing or by telegram, to [348] anybody in the Production and Marketing Administration in Washington?

A. Yes. I sent a telegram to Mr. S. R. Smith.

Q. That's the same gentleman who appeared here this morning and is in court?

A. Yes, that is correct.

Q. And holds high position in the Production and Marketing Division?

A. Yes, sir. He is director of the Fruit and Vegetable Branch.

Q. And just so his Honor may know that there are no hard feelings in any of these matters, you have known Mr. Smith for many years and you and he have dealt across the table on very many matters, is that not correct?

A. I have known him, and esteemed him very highly all the years that I have known him, back into the middle '30's at least.

(Testimony of Dwight K. Grady.)

Q. As does the whole dried fruit industry, is that not correct?

A. Everyone in the industry has the same regard for him.

Q. In sending this telegram to him, you were sending it to a man deemed as a friend but in an official capacity, is that correct?

A. That is correct.

Q. And I show you a copy of a [349] telegram——

Within our general stipulation, I think we can use copies, your Honor.

Is that right, Mr. Wolkinson, we may use copies?

Mr. Wolkinson: Yes, indeed.

Q. (By Mr. Dinkelspiel): (Handing document to witness.)

A. Yes. This is a telegram that I sent to Mr. Smith on September 9.

Mr. Dinkelspiel: I offer it in evidence, if your Honor please, as Plaintiff's Exhibit No. 6.

The Court: Is there any objection?

Mr. Dinkelspiel: Mr. Wolkinson, the Court is asking you a question.

Mr. Wolkinson: No objection.

The Court: It may be received.

The Clerk: Plaintiff's Exhibit No. 6 in evidence.

(Thereupon telegram dated September 9, 1947, from Grady to Smith, was received in evidence and marked Plaintiff's Exhibit No. 6.)

(Testimony of Dwight K. Grady.)

Mr. Dinkelspiel: Has your Honor had an opportunity to read this?

The Court: Yes. I glanced at it. I haven't really digested it. I glanced at it.

Mr. Dinkelspiel: With the Court's permission, I might like to read it. It's rather fundamental.

"Western Union Telegram. September 9, [350] 1947. S. R. Smith, Production and Marketing Administration, U. S. Department of Agriculture, Washington, D.C.

"Haye just discussed by telephone with Ted Kluge his conversation with you respecting Prune program and have checked with several others as to procedure best calculated to avert unfavorable reactions in recently announced programs for purchase Prunes, Raisins. It seems consensus that if purchases immediately contemplated could be certified as purchases in course of export, negotiations between your department and industry could be conducted under auspices of Webb-Pomerene association, which could provide for price basis satisfactory to producers and department. Such program would contemplate allocations on fair basis to all handlers. Discussion should include further consideration of 100/120s in Prunes. Commercial handlers have been inable contract new crop tonnage to date which approximates two-thirds total crop. Same thing prevails among Raisin handlers and believe satisfactory basis could be stabilized which would permit immediate resumption of trading these commodities. Present price situation in Raisins

(Testimony of Dwight K. Grady.)

very soft and market has declined substantially since announcement but with no trading. This plan would tend to establish [351] foundation at price levels you could approach through such negotiations and would, we believe, start things moving and break present deadlock. Am sending this at Kluge's suggestion with concurrence of Richmond, Keeler, Griffin. Signed, Dwight K. Grady." [352]

Q. Who is Kluge?

A. Mr. Kluge is the General Manager of California Prune & Apricot Growers, a growers cooperative marketing association.

Q. Richmond, who is he?

A. Richmond is a member of the canning and packing firm of Richmond-Chase Company, San Jose.

Q. Keeler?

A. Mr. Keeler was the General Manager of Sunmaid Raisin Growers Association, also a growers marketing cooperative.

Q. And Griffin?

A. Griffin is an official of the California Packing Corporation, who handled canned goods and dried fruits.

Q. Would you say that these people represented, together with yourself, a substantial part of the dried fruit industry in this part of the state?

A. Yes, and they were all members of various committees that had worked with the Government in the past on dried fruit programs.

Q. Is it fair to state they expressed the view,

(Testimony of Dwight K. Grady.)

talking for the industry from the viewpoint, at least, of the packers? A. I would say, yes.

Q. Sunmaid—pardon me.

A. (Continuing): They represented a very substantial cross-section of the industry and were the opinion-making people in the industry, substantially. [353]

Mr. Wolkinson: I respectfully except and suggest that this testimony be stricken on the ground that it is hearsay, the testimony and the views of the industry as Mr. Grady claims to voice them.

The Court: Motion is denied.

Q. (By Mr. Dinkelspiel): Mr. Grady, Sunmaid Raisins in addition to being a packer, also was a grower of raisins, was it not?

A. Their members are all growers.

Q. Their members are all growers?

A. Yes, sir.

Q. Do the members constitute a substantial portion of the total crop growing in the State of California?

A. Yes, approximately one-third of all the raisins produced in California are produced by members of that association.

Q. Now, you state in your telegram that present price situation in raisins very soft and market has declined substantially since announcement with no trading. Would you explain to his Honor what the facts were with respect to that?

A. Yes. The announcement appeared in the public press on September the 6th, which was a Satur-

(Testimony of Dwight K. Grady.)

day, and most of the offices in the business were closed. The announcement was released on September 5. The prevailing market on raisins was about nine and a half cents a pound. The market on the opening of business on the next business day, September the 8th, was off fully a [354] cent with a very soft—I mean, tendency or trend in the market, and my recollection is that within the next 24 hours the price was off a cent and a half with some of the cheaper sellers in the business willing to quote eight cents—I mean, below eight cents.

Q. Was it possible to do much trading at all in that market?

A. No. The announcement caused confusion in the market and packers could not buy nor growers willingly sell. As a matter of fact, it was too soon for the market, the raisin market, within the raisin industry to have established itself with respect to purchases from producers or generally for sales to the trade.

It was at a point where the raisins were just going down on trays, they had not yet been made, and nobody knew to the extent, what extent raisins would be available, because growers normally do not start to sell until they have pretty well completed the lay, as it is called, which would be late in September.

Q. Now, Mr. Grady, was it your sincere and honest opinion that this was a bad program?

A. Indeed, that is why I was making suggestions to help correct it.

(Testimony of Dwight K. Grady.)

Q. And whether or not the particular program would be a financial benefit to your company?

A. No, our interest in it at the time was to try to help [355] bring about stability and to help the program to achieve the desired end, which was to support the growers and protect them from a very badly distressed price situation.

Q. Just at this point do you wish to tell his Honor whether or not it is true that prosperous growers generally worked together with prosperous packers?

A. Oh, yes, invariably in times of distress. The packers don't fare nearly so well as in times of grower prosperity.

Q. Now, you suggested an alternative in this telegram, a program under the Webb-Pomerene Association which could provide a price basis satisfactory to the producers and the Department.

Now, standing alone I don't imagine that is any more understandable to his Honor than it is to me. Would you explain that, please?

A. Well, the Webb-Pomerene law is a law that was passed shortly after World War I. It authorizes combinations of competitors in export trade to do certain things that otherwise would be prohibited by the anti-trust law.

The organization of such associations is a very simple one. All that it is necessary to be done is to have a meeting of the competitors and to file a report with the Federal Trade Commission of the fact of the association: it need not be incorporated,

(Testimony of Dwight K. Grady.)

in other words. And then they proceed to function, conforming to certain record keeping and reporting that is required under the law to the Federal Trade Commission. [356]

When such an association is formed it is then free to negotiate prices to effect allocation, and to do any of those things so long as they don't interfere with the domestic affairs of domestic competitors, and it was with the thought in mind that so long as it was the desire, we assumed, of the Government to benefit producers, and it was our desire to avoid hurting producers that the suggestion was made that with an export association all of the raisins then intended for shipment in export could be negotiated under such auspices thereby removing the competitive effect, the competitive effect in terms of the depressing prices, and at least establish a price level that growers could enjoy and which would still permit the packers to operate without losses.

Q. Had there been such Webb-Pomerene Associations before?

A. Oh, yes. There is one still in existence known as the California Dried Fruit Export Association.

Q. Was there any particular period of time when they were more active than others?

A. Well, yes, the life of an export trade association is 20 years when it is subject then to renewal. During the pre-World War II days and during part of the depression we had an export association governing the transaction in prunes in export. We also had an export association governing sales in export

(Testimony of Dwight K. Grady.)

of raisins which, when their usefulness had ended, were terminated. And the suggestion here was because of the [357] simplicity of procedure, almost by announcement you could create a new association and therefore represented a quick and easy way to solve—to solve the problem, at least insofar as price effects were concerned. Therefore it was recommended. [358]

* * *

Q. (By Mr. Dinkelspiel): Mr. Grady, this telegram also states that commercial handlers have been unable to contract new crop tonnage to date which approximates two-thirds total crop.

That, I believe, referred to prunes, and then you said the same thing prevails among raisin handlers. Is that a fact, is that a true statement of the condition at that time? A. I would like to see that.

Well, Mr. Dinkelspiel, the sentence reads: "Commercial handlers have been unable contract new crop tonnage to date which approximates two-thirds total crop."

The approximation of two-thirds total crop means that the commercial handlers handle two-thirds of the total crop, both in prunes and raisins, because in each case the cooperative controls one-third of the crop.

Q. You and Cal-Pak and others are commercial handlers; Sunmaid and other cooperatives are——

A. That's right.

Q. ——are cooperative handlers.

A. And therefore the two-thirds of the crop

(Testimony of Dwight K. Grady.)

which would be bought by commercial handlers, purchases could not be made from that segment of the crop by the commercial handlers.

Q. Yes.

A. The point being that the cooperatives have their tonnage under contract through membership contracts and therefore do not have to go out and buy the fruit. And they would, in a sense, [359] have contractual protection, at least, as to supplies under any marketing circumstance.

Q. And what did that reflect with respect to a long or short position in raisins if you were asked to bid at this time?

A. It meant that any sales made pursuant to this program would be made on a definitely short position; the packers would not have contracts to cover their sales, nor would they have available to them raisins physically to make shipment if such were the position at the time.

Q. Now, I show you a copy of a letter which you sent to Mr. S. R. Smith, dated September 10, 1947—withdraw the statement that you sent it, and ask you whether you sent the original of that?

A. Yes, I wrote this.

Q. You wrote that letter at or about the time it bears the date of September 10?

A. September the 10th.

Q. And that is just the day after your telegram?

A. That is correct.

Q. That's the same Mr. Smith who testified, the same position that he had as previously testified?

(Testimony of Dwight K. Grady.)

Mr. Dinkelspiel: I offer it in evidence, your Honor please.

The Court: May be marked in evidence.

The Clerk: Plaintiff's Exhibit No. 7 in evidence. [360]

* * *

Q. (By Mr. Dinkelspiel): I call your attention to just one sentence, however, maybe to a subsequent sentence.

Therefore unless there is a radical change in the situation in the next few days packers offerings in response to invitation to bid will be substantially short sales at least insofar as new crop is concerned except that the co-ops have their tonnage guaranteed under membership contracts will be covered after any tonnage offered.

So was that a true statement of your belief and of the condition at that time?

A. Yes, we were unable to buy any raisins at all from growers, whereas the cooperative, as that states, has its tonnage controlled by virtue of membership contracts. [361]

Q. So both in the telegram and in this letter you conveyed to Mr. S. R. Smith that the packers, including yourselves, would be in short position?

A. Yes.

Q. If they bid for any raisins?

A. That's correct.

Q. And you also state in this letter that—I will pass by the aspirin part and the headache in it—withdraw the question.

(Testimony of Dwight K. Grady.)

I notice that you say: All I can tell you as far as our own people are concerned that we are doing our best to be constructive about the matter and will not participate in this agitation going on at the present time.

Is that a true statement of the position of your company? A. Yes, sir, it is.

Q. You also say: Of course, as far as raisins are concerned they have softened considerably since Monday morning and Lord knows what they will be when we reach the deadline for mailing our bids.

Now, that Monday morning was the first Monday after the September 5th announcement, was it not?

A. Yes, I think it was, September the 8th was a Monday morning.

Q. Yes. And raisins had softened and you didn't know what the price would be when the bids were to be made, and that is a [362] correct statement?

A. Yes.

Q. A correct statement of what——

A. It was impossible to predict where raisin prices would go.

Q. I see it says down here "CC: E. M. Graham" at the end of the letter, does that mean a copy was sent to Mr. Erwin Graham?

A. Yes, that is correct.

Q. The man you testified about before.

Now, Mr. Grady, you did, did you not, receive a reply? A. Yes, I did.

Q. To your letter and telegram, Exhibits 6 and 7? A. Yes, sir, I did.

(Testimony of Dwight K. Grady.)

Q. I show you what purports to be a telegram, and I am happy to see it didn't come collect, looks like it is Government paid, purportedly signed by S. R. Smith, Fruit & Vegetable Branch, and ask you whether you received that telegram at or about the date it bears?

A. Yes, this is the telegram I received from Mr. Smith.

Mr. Dinkelspiel: I offer it in evidence, if your Honor please. The date of the telegram, for the purpose of the record, is September 12, 1947. [363]

* * *

Q. (By Mr. Dinkelspiel): Was this the only communication you received from Mr. Smith in this matter in response to your letter and telegram?

A. Yes, I think that it was.

Q. I notice that it says that "Re: Tel." which I assume is in response to your telegram, in speech at Fresno August 4 and press release issued Albuquerque September 5, Secretary stated that dried fruit prices would not be supported at fixed level.

Do you recall, do you know what the reference is to the August 4 speech at Fresno?

A. Yes, sir, a meeting was held in Fresno, a luncheon meeting, honbring Secretary Anderson who was traveling down the Pacific Coast at the time, and Secretary Anderson made an address to a committee representing California agriculture and its various segments at that luncheon meeting in Fresno.

(Testimony of Dwight K. Grady.)

Q. And then the press release of September 5 you understood to mean, did you, the release which is in evidence?

A. Yes, the announcement of the program.

Q. Announcement of the program. Now, I note this telegram says, "Dried fruit prices would not be supported at fixed level."

A. That's correct.

Q. You understand that to be in response to your suggestion [364] of a Webb-Pomerene Association?

A. Yes, that's right.

Q. Because that would involve——

A. I believe the wire specifically said a Webb-Pomerene Corporation set-up would not be in accordance with the Secretary's statement and his announcement.

Q. In other words, immediately following the statement that dried fruit prices would not be supported at fixed level, referring to the speech and announcement of the Secretary, then it says: "Announcement of prices to be paid by CCC or any arrangement under Webb-Pomerene would be contrary to Secretary's statement."

A. That's right.

Q. That is what you meant in your last testimony? A. Yes.

Q. The Webb-Pomerene Convention or Association is a price-fixing arrangement which by statute is exempted from the anti-trust laws, isn't that it?

A. That's correct, and that's why we proposed it.

(Testimony of Dwight K. Grady.)

Q. Then the program as announced, reading from the telegram, is substantial contribution toward stabilized conditions within dried fruit industry.

The program as announced, you took it to mean the announcement for the purchase of the 61,000 maximum tonnage?

A. Yes, that was the only program that had been announced. [365]

Q. Without a price support?

A. That's correct.

Q. At competitive bidding.

And then the last sentence:

"We solicit and expect receive cooperation Rosenberg and other packers in making it a success."

Did you understand that as an invitation to you to participate?

A. I understood as more than that, I took it virtually as instructions.

Q. It is a fact, is it not, Mr. Grady, that your company deals in all dried fruit commodities with the Government and is necessarily required to be cooperative with its programs?

A. That was our construction of our place in the industry.

Q. Now, I asked you whether or not you communicated with people in Washington with respect to this program announcing your objections to it. Now, I will ask you whether after September 5 or 6 and before bidding for any of the raisins you communicated with anybody in any other office of the

(Testimony of Dwight K. Grady.)

Fruit & Vegetable Branch of the Production & Marketing Division of the Department of Agriculture or of the CCC?

A. I discussed the matter with Mr. Walker here in the Berkeley office.

Q. And Mr. Walker held what position?

A. He was, I presume they would call him the Chief of the [366] Regional Office of the Fruit & Vegetable Branch.

Q. And he is situated in Berkeley?

A. Yes.

Q. And what was the substance of your conversation with him?

A. Primarily for purposes of information. We knew that the program emanating from Washington, and we would keep in contact with him and did keep in contact with him to learn if there were any changes that we might expect. The reason for this was that there was a tremendous turmoil and uproar prevailing in the San Joaquin Valley, and it was important for us to know if any changes were suggested in communication with his office from Washington.

Q. So that was the extent of your conversations at the local level?

A. Well, we probably discussed the merits and demerits of the announced program.

Q. I take it that your position to Mr. Walker as to merits, first, the demerits of the program, were the same as stated to the Washington people?

A. Oh, yes, we had only one thought about the

(Testimony of Dwight K. Grady.)

program, and we expressed on every opportunity, I believe.

Q. Now, Mr. Grady, in addressing Mr. S. R. Smith by letter and telegram, was it your intention to address substantially the highest official in the Fruit and Vegetable Branch of the Production and Marketing Division? [367]

A. Yes, Mr. Smith was the Director of that branch, and the administrative responsibility for developing the programs and conducting them was vested in him and his subordinates in the branch.

Q. So you addressed him as a man highest from whom you might expect to get relief?

A. Yes, that was the customary channel of communication with regard to dried fruit program, through Mr. Smith and his associates in the branch.

Q. Then when Mr. Smith sent back to you his telegram, which is Exhibit No. 8, did you consider this a final decision of the Department?

A. Yes, I concluded that there was to be no change and that when the contracts were offered by Mr. Smith or his designees those would be the conditions under which the offers would be made.

Q. Was it the decision of your company to further oppose or to proceed under the program at that time?

A. It was the decision of the company to go ahead and submit offers pursuant to Mr. Smith's solicitation and expectation.

Q. And this was despite your own feelings as to the program?

(Testimony of Dwight K. Grady.)

A. Yes, our feelings were overruled, our suggestions were not accepted, and consequently we went ahead and bid on a realistic basis to get business.

Q. I show, Mr. Grady, you this Announcement No. 1 dated [368] September 10, 1947, entitled: Packard Processed Dried Apples, Dried Peaches, Dried Prunes, and Raisins. [369]

* * *

Q. (By Mr. Dinkelspiel): I show you a mimeograph of this announcement and ask you whether such an announcement, with accompanying papers, was received by your company within a day or so of September 10, 1947?

A. Yes, sir, this is the announcement that we received.

Q. And after receipt of that announcement did you enter your bid for any amount of raisins?

A. Yes; this provided for submission of offers to sell, and the company that I was then associated with submitted offers to sell on this form.

Q. And for how many pounds or tons of raisins?

A. I believe the tonnage offered was 10,000 tons. [369]

Q. 10,000 tons? A. 10,000 tons of raisins.

Q. At any price fixed in the contract?

A. Yes, raisins were fixed at a price of $151 a ton for raisins packed in the usual 30-pound container, and add $152 a ton for raisins packed in ex-

(Testimony of Dwight K. Grady.)

port, there being a one dollar differential in the cost of the package in each case.

Q. I believe you have testified, the first day you were on the stand, that with the experience of your company at that time that there was a differential between—of $40 over the cost of natural raisins and the cost of natural raisins plus your own cost to get them available for sale as packed processed.

A. Yes, that was the approximate difference between natural condition raisins and sweat boxes and the rule-of-thumb packing cost differential that would be included.

Q. So is it a fact that to have broken even on these contracts raisins would have to have been purchased at $110 or better per ton?

A. That is approximately right, yes.

Q. Without profit?

A. Yes, that is correct.

Mr. Dinkelspiel: Now, the contract, your Honor, is Exhibit 2 to the Answer. I would like to offer for facility of use the forms, the forms not completed with the amounts [370] as our exhibit next in order.

Mr. Wolkinson: I think I can save time——

The Court: I suggest that you conform a copy sometime——

Mr. Wolkinson: I am here to stipulate, if counsel would agree, subject to Court's direction, of course, that we in connection with the argument in November, 1951, in behalf of the defendant attached Exhibits 1 to 5 in order, and I notice that Exhibit 1 is this very announcement just discussed, a photo-

(Testimony of Dwight K. Grady.)

stat. Attached to that exhibit is an exact duplicate photostated of the contract, the offer signed, signatures are there, the Standard Contract Conditions, and similarly with respect to the second contract, and the announcements. Complete duplicates are attached, including the acceptance and if counsel will stipulate that these are correct, and we vouchsafe that they are, they are in order, and we can hand them up to the Court and we need not encumber the record any further and waste any more time.

I will show them to you first, counsel.

Mr. Dinkelspiel: Thank you.

Mr. Wolkinson: And if you think they are all right we can hand them up to the Court.

The Court: We might take a short recess while you are examing them.

(Short recess.) [371]

Mr. Dinkelspiel: Counsel has kindly made available to me certain photostats of documents that I can use with this witness, and I think it will make a clearer record, so I may be retracing myself very briefly.

Direct Examination
(Continued)

By Mr. Dinkelspiel:

Q. Mr. Grady, I show you a photostatic copy of Announcement No. 1 dated September 10, 1947. Is it a fact that your company received that on or about the dates it bears?

(Testimony of Dwight K. Grady.)

A. Yes. We received this in mimeographed form.

Q. Yes. And attached to it is the bid form?

A. Yes, that is correct.

Q. In case you wished to bid?

A. That's right.

Q. There was no alternative method of bidding except as set forth on the form?

A. No, that was the form on which we were expected to bid if we decided to bid.

Mr. Dinkelspiel: I offer this in evidence as Plaintiff's next exhibit in order.

The Court: It may be marked in evidence.

The Clerk: Plaintiff's Exhibit No. 9 in evidence.

(Thereupon photostatic copy of Announcement No. 1, September 10, 1947, and attached bid form, were received in evidence and marked Plaintiff's Exhibit No. 9.) [372]

Q. (By Mr. Dinkelspiel): Did your company decide to bid?

A. Yes, my company did decide to bid.

Q. When was that decision reached? Explain to his Honor, if you wish.

A. I don't remember the exact date when the offer to sell was required to be returned to the Fruit and Vegetable Branch, but prior to that date and for several days, particularly following the advices from Mr. Smith on September the 12th that the program would not be changed, we decided that we would bid and did bid.

(Testimony of Dwight K. Grady.)

Q. That was after the announcement from Mr. Smith that the program would not be changed?

A. Yes, that's correct.

Q. And at that time did you have before you the estimate of crop surplus?

A. Oh, yes, we had all of our estimates. We had appraised the market situation, we had decided that prices would be seriously below the level which they should have been and we calculated what competition would be likely to bid, and arrived at a price that we felt had a chance of getting the business.

This was done because we had given up hopes that the program would be changed. We knew that the probabilities were very strong that there would be a large crop and in spite of the fact that this would place the company in a [373] serious and an unaccustomed short position we nevertheless felt that it was important to us as commercial handlers of raisins to see the surplus removed so that there would be stability (if not buoyancy), which we hoped for, in the price structure on the balance of raisins that we would handle commercially in distribution both in domestic markets and in foreign markets. We felt that if the surplus could be alleviated to any extent, that our participation was virtually mandatory; as large packers, we would have to perform whatever service we could in helping to relieve the surplus.

Q. Because of your position in the industry you felt obligated to go along in any program, is that correct?

(Testimony of Dwight D. Grady.)

A. Oh, yes. We were not only—not only wanted to participate in any business that is going—that is the nature of this business—but that we were being relied upon to participate in these programs, just as we were in other phases of the same program, namely, in the removal of surplus prunes and apples and so forth.

Q. You were in short position at that time?

A. Oh, very definitely short. We owned no raisins at that time.

Q. And you had outstanding commercial contracts, had you?

A. We probably had some very small quantities of commercial contracts. The market had not yet been established.

Q. Well, Mr. Grady, you then bid, did you [374] not? A. Yes, we submitted a bid.

Q. On the bid form furnished by the Government? A. That is correct.

Q. Pursuant to Announcement No. 1?

A. Yes, that's right.

Q. I show you a photostatic copy of such a form and ask you if that is a photostatic copy of the bid your company entered?

A. Yes, this is the bid submitted by our company for 20 million pounds of raisins packed in 30-pound boxes at a price of $.0706 per pound, and $.0755 per pound.

Q. That is stated in pounds in this bid, is that correct? A. Yes. But it means 10,000 tons.

(Testimony of Dwight D. Grady.)

Q. You just transposed the tons and the prices for the record.

The Court: If I may interrupt you momentarily; so the record will reflect this.

Examination

By the Court:

Q. In the light of the market conditions as they then unfolded, in view of your expert notice of the market, how did you determine that price? The market, according to your testimony, had a great degree of instability and was to a mild or large extent chaotic and soft and unsound.

Now, how did you determine that? May I ask you that?

A. Yes; in the first place, we get knowledge of the domestic [375] market by reports from our brokers throughout the United States advising us of quotations that are being made by other factors in the trade, at which they might be willing to book business or indicating their ideas of values. Those prices reflected around eight cents a pound as a price that some sellers were willing to bid. That gave us the idea—that gave us information as to what generally the market was resolving itself into.

The prices reflected here reflect that eight-cent price less cash discount and brokerage, which are two and two and a half per cent, respectively, and then shaded a few pennies to be sure that we were in competitive position to participate in the business.

* * *

(Testimony of Dwight D. Grady.)

Q. Would the growers at that juncture be willing to sell? Was it a free market?

A. No, growers during this time in any normal year would be hardly prepared to sell. The vast majority of producers like to know what their tonnage is before they contract very freely. So it is not possible, for example, under any normal set of circumstances for a handler to go out and contract his tonnage that early in the year. In fact, it usually takes some weeks after October 1st before he begins to acquire the very large tonnages that are acquired at that time. That's the peak season of the year. And he will be receiving very large tonnages daily into his plant beginning about the first of October or thereabouts.

But in this particular year, because of the demoralizing effect of this program upon the market and in the minds of the producers, they were even more than normally reluctant to sell, they didn't have raisins made, they didn't know whether they would make the raisins since they were still going on the trays, and, in addition to that, they were wholly dissatisfied with the price level that was being reflected through the announcement of a program to buy very much less than the total estimated surplus expected to be produced.

(Testimony of Dwight D. Grady.)

Direct Examination
(Resumed)

By Mr. Dinkelspiel:

Q. You might at this point explain [377] to his Honor the situation with respect to the growers—I am sure it is going to come out in the course of somebody's testimony—about Mr. Setrakian.

A. Yes. During the war years, and to cooperate with the War Food Administration in raisin programs which were established by War Food Order requiring all raisin variety grapes to be converted into raisins for war purposes, and that meant that several hundred thousand tons of grapes that normally would have moved into wineries were by order converted to raisins. A raisin producers' association was set up, consisting of representatives of the producers, generally and primarily, to cooperate in seeing that the program functioned in that respect and to maintain liaison with the War Food Administration, and one Mr. A. Setrakian was the president of that Association, and a very vocal and articulate gentleman, quite an effective leader, who led, what you might call, a revolt against this program. He characterized it as disgraceful, for example

(Testimony of Dwight D. Grady.)

Examination

By the Court:

Q. How was that revolt manifested?

A. By many meetings, by continuous barrage in the press, by radio exhortations to producers not to sell, by, I am convinced from the content of the newspaper articles that were released by Mr. Setrakian, that he was in constant and continuous contact with Washington by telephone and perhaps even [378] in person attempting to get the program changed, and during that period he was exhorting producers not to sell their raisins for less than either $150 a ton or 90 per cent of parity or some such goal, and growers were generally responsive.

So our company, for example, was not able to buy raisins in September.

Q. That was a condition which prevailed at the very time you submitted your bid? A. Yes.

Q. You knew of those conditions at that time when you submitted your bid?

A. We knew of those conditions, but we also——

Q. How did you expect to cover?

A. We expected that Mr. Setrakian would not be able to change the laws of supply and demand, which meant that there was still a surplus of one hundred thousand tons and that raisins could be bought to satisfactorily cover this program at prices below those he was exhorting the growers to hold for. It was simply the sheer weight of economic law involved there. And when the Government told

(Testimony of Dwight D. Grady.)

that the program would not be changed, we then were convinced that it would not be changed and that we would be able to effectively cover without suffering loss under this program.

Q. Did you make any endeavors to cover [379] it?

A. Yes. We were continuously trying to buy raisins all through September and October, with no success. It wasn't until——

Q. What were your sources of buying powers, how would you exercise——

A. Pardon me. We maintained—we maintained and maintain a Fresno office and have district buyers that operate out of the Fresno office.

Q. In the field?

A. In the field, constantly canvassing growers.

Q. You finance the growers?

A. At times we do.

Q. With respect to those persons whom you finance I assume that you have a very happy situation—wouldn't you?

A. No, we wouldn't have a happy situation because when you finance, you finance as a loan which the grower can always pay back. If you have a contract with him in addition, which you try to get, the contract leaves the price open, and you might have to pay, in the event Mr. Setrakian had been successful in getting the program changed, instead of paying $110 per ton we might have been required to pay $150 for raisins.

(Testimony of Dwight D. Grady.)

Q. Were you able to fulfill your contracts out of such sources?

A. We purchased eleven tons, as I recall it, of raisins in [380] the month of September, and we purchased something in the neighborhood of 100 tons in the month of October. Then——

Q. How many tons did you purchase immediately prior to the announcement of the changed policy?

A. We had purchased—well, the announced change came to us on October the 14th, and just as a guess because the figures that I compiled at the time were on a monthly basis, but at the time the figures were—at the time the change in program was made I venture to believe that our total purchases was not more than 250 tons to cover 14,330 tons commitment.

Q. In addition to that, you had commercial contracts?

A. Oh, yes, some commercial contracts but there was very little business going from September 6th when it became public knowledge to the trade and everybody else that raisin prices were going to be lower and there would be no speculative buying at that time by any wholesaler or chain store operator or baker or anybody else, nor would we be generally willing to sell short in the face of such a decision. We sold short in this situation, in a sense in protest.

Q. Well, that short position that you assumed or occupied was the result of the unanimity of

(Testimony of Dwight D. Grady.)

viewpoint of you and your colleagues and associates? A. Yes.

Q. You all agreed upon that? [381]

A. Yes.

Q. I assume you recognized the hazards, the hazards implicit in the transaction?

A. Yes. We were complaining about the hazard. We were objecting to the fact that we would have to sell short, and to sell short in a situation where the industry was being seriously damaged by the short position, it meant a necessity of somebody taking a loss. If we were successful in buying raisins to cover these contracts at the price that the contracts indicated, then the producers would lose the money, and if we sold on the basis that resulted in higher prices, we would lose the money, and that just isn't good business.

The Court: All right. Thank you.

Direct Examination
(Resumed)

By Mr. Dinkelspiel:

Q. Mr. Grady, just one or two questions in closing this part of the examination.

You didn't like the program; you tried to get it changed? A. That's right.

Q. In the interests of growers and packers alike?

A. That's right, sir.

Q. And when you went ahead of the program, you did so on the strength of the law of supply and

(Testimony of Dwight D. Grady.)

demand based upon the Government's announcement that it was taking less than the total [382] surplus?

A. We thought it was good business judgment, in view of the fact that we had assurance that the program would not be changed.

Q. And that meant that they were taking less than the total anticipated surplus?

A. Yes. We could foresee raisins actually going begging at the end of the season or even before the end of the season because the commercial market could not possibly absorb the available supply.

Q. Now in his opening statement Mr. Wolkinson made the remark that the packers wanted to make a killing out of this transaction.

I wish you would answer that statement if you can.

A. Well, our desire was quite to the contrary, Mr. Dinkelspiel. We were called upon as an instrumentality of the industry to complete this program. We had that in a wire telling us that we were solicited and expected to do so. Our interests, being a large concern with large investments in the dried fruit business in the form of facilities and the like, is to preserve to the best of our ability the producing industry. The tailoring of supply to demand, if accomplished, in these surplus-producing industries, would give us a better commercial opportunity to make money than we could ever make in a demoralized, depressed industry. Experience throughout the history of the company has been [383] that at

(Testimony of Dwight D. Grady.)

reasonable price levels to producers the company actually earns more money per dollar invested than it does under distressed conditions. That was particularly manifested during the war when prices were high and company earnings were likewise high. [384]

Q. (By Mr. Dinkelspiel): Instead of making a killing, part of the suggestion that you had to the Secretary's office was better prices to the grower, was it not?

A. We definitely made the point that if the Webb-Pomerene Association technique had been employed, that it would result in prices to producers which the Department could approve.

Q. Now, to go back to where we were, will you transpose, just for the purpose of the record, the tonnage figures, the pound figures into tons?

A. *Yes, this contract called for 20 million* pounds of raisins, which is 10,000 tons; and for raisins to be shipped in export the price was $152 a ton, and for raisins to be shipped in other than export channels the price was $151 a ton.

Q. The difference being because of the packaging for export?

A. Yes, export containers contain a double double collar, cost a dollar per ton more to supply the double double collar, in the box.

Q. This was for packed processed raisins?

A. Yes, packed processed raisins.

Q. I believe you testified to cover this contract without loss you would have had to acquire raisins

(Testimony of Dwight D. Grady.)

at approximately $110 a ton? A. Yes.

Mr. Dinkelspiel: I offer the contract in evidence, your Honor—I offer the bid form. [385]

The Court: May be marked.

The Clerk: Plaintiff's Exhibit No. 10 in evidence.

(Thereupon bid form identified above was received in evidence and marked Plaintiff's Exhibit No. 10.)

Q. (By Mr. Dinkelspiel): I hand you a telegram which is addressed to you by Mr. R. M. Walker, addressed to Rosenberg Bros., under date of September 23 apparently with reference to this bid of yours, and ask you if you received that?

A. Yes, this was the telegraphic award sent to us by Mr. Walker, the contracting officer.

Q. And that contained, did it not, an additional condition to the contract?

A. Yes, it divided the original 20 million pounds into one lot of 12 million pounds at $151, and 8 million pounds in export containers at $152 a ton.

Mr. Dinkelspiel: I offer this as plaintiff's next in order.

The Court: It may be marked.

The Clerk: Plaintiff's Exhibit No. 11 in evidence.

(Thereupon telegram identified above was received in evidence and marked Plaintiff's Exhibit No. 11.)

Q. (By Mr. Dinkelspiel): I show you what

(Testimony of Dwight D. Grady.)

purports to be a copy of a telegram dated September 24 to R. M. Walker, Production and Marketing Administration, United States Department of Agriculture, in Berkeley, and ask you if that was [386] sent, the original of that was sent in reply to the telegram from Mr. Walker, Plaintiff's Exhibit 11?

A. Yes, this was Rosenberg's acceptance of the telegraphic award of Mr. Walker under the conditions that he outlined.

Q. Acceptance of the conditions?

A. Yes, and the price.

Q. Yes.

Mr. Dinkelspiel: I offer this next in order, your Honor.

The Court: It may be marked.

The Clerk: Plaintiff's Exhibit No. 12 in evidence.

(Thereupon telegram of acceptance identified above was received in evidence and marked Plaintiff's Exhibit No. 12.)

Q. (By Mr. Dinkelspiel): Now, Mr. Grady, did you subsequently or your company, rather, receive announcement in a mimeographed form, United States Department of Agriculture, dated September 25, 1947—showing you what purports to be such a document? A. Yes, sir, we did.

Q. That came to you in the same manner as other distributions of the Department of Agriculture? A. Yes, that is correct.

(Testimony of Dwight D. Grady.)

Q. In the same manner as the September 5 release?

A. That would come to us in the mail.

Q. In the mail?

Mr. Dinkelspiel: I offer this in evidence, your Honor, as plaintiff's exhibit next in order. [387]

* * *

Mr. Dinkelspiel: I wish to call your Honor's attention in connection with this document last introduced, Exhibit No. 13, something that I referred to in argument before in that it is a Washington release. "USDA announces dried fruit purchases. The United States Department of Agriculture announced today the purchase by Commodity Credit Corporation of 59,450 tons of dried fruit from California processors under the program announced by the Department September 5, 1947."

"The Department also announced that processors are being invited to submit offers on an additional 15,000 tons of dried prunes, 31,000 tons of raisins and 1,750 tons of dried peaches."

Q. The reference to the purchase of Thompson Seedless raisins was that they were at prices ranging up to $162 per ton, your price being 151 and 152, is that correct? A. Yes, sir. [388]

Q. This Exhibit 13 refers to the fact that the processors were being invited to bid on another 31,000 tons. It is a fact, is it not, that the first offer was for 30,000? A. Yes, that's correct.

Q. I will show you Announcement No. 2 which

(Testimony of Dwight D. Grady.)

followed by a few days that letter of September 25, being dated October 1, 1947, which refers to the announcement of 31,000 tons—announced and asked for bids on 31,000 tons, and ask you if you received that in mimeographed form through the mail in the usual channels of communication with the Department of Agriculture? A. Yes, sir, we did.

Q. To which was attached, or was there attached to that the bid form?

A. Yes, this was the same form, typed form, as the original invitation to bid.

Q. So this being the bid for the balance of the 61,000 tons originally announced.

Mr. Dinkelspiel: I offer this in evidence as Plaintiff's Exhibit No. 14.

The Court: It may be marked.

The Clerk: Plaintiff's Exhibit 14 in evidence.

(Thereupon Announcement No. 2, identified above, was received in evidence and marked Plaintiff's Exhibit No. 14.)

Q. (By Mr. Dinkelspiel): Pursuant to that invitation to bid [389] did your company bid?

A. Yes, we did.

Q. I show you a bid form completed and ask you if the original of that was the bid form which you completed and transmitted to the Department of Agriculture?

A. Yes, this is the photostatic copy of the bid that was submitted.

Q. What was your bid for, the amount?

(Testimony of Dwight D. Grady.)

A. It offered 20 million pounds at varying prices. The Lot No. 1 was 10 million pounds at prices of .0747 for export containers, and .0742 for domestic containers.

Lot No. 2 was 10 million pounds at .0773 and .0768 for those packs respectively.

Q. And will you transpose those into——

A. Yes.

Q. ——tonnage figures, please?

A. The Lot No. 1 prices were for export containers, $149.40, and for domestic containers $144—$148, pardon me. $148.40.

Q. These prices are lower than the prices at which you bid?

A. Well, Lot No. 2 was at a lower price offering than the prices awarded on the previous bid, and Lot No. 2 was a price higher than those prices.

Q. And state what happened to that bid.

A. Company was awarded 4,330 tons, which would be 8,660,000 pounds on lower-priced items that I have converted to you [390] to dollars.

* * *

Q. (By Mr. Dinkelspiel): I show you the telegram of acceptance and ask you if you received that?

Mr. Wolkinson: Dated October 13, counsel?

Mr. Dinkelspiel: Yes, dated October 13.

A. Yes, sir, this is the acceptance received from Mr. Walker, the contracting officer.

Mr. Dinkelspiel: Your Honor please, I will first

(Testimony of Dwight D. Grady.)

offer [391] in evidence the completed bid form pursuant to Announcement No. 2 as Plaintiff's Exhibit No. 15.

The Court: It may be marked.

The Clerk: Plaintiff's Exhibit No. 15 in evidence.

(Thereupon the bid form identified above was received in evidence and marked Plaintiff's Exhibit No. 15.)

Mr. Dinkelspiel: And then the acceptance, telegraphic acceptance dated October 13, 1947, and ask that be entered, marked as our exhibit next in order.

The Court: It may be marked.

The Clerk: Plaintiff's Exhibit No. 16 in evidence.

(Thereupon acceptance telegram identified above was received in evidence and marked Plaintiff's Exhibit No. 16.)

Q. (By Mr. Dinkelspiel): The telegram, for the purpose of the record, which is No. 16——

The Clerk: Yes, sir.

Q. (By Mr. Dinkelspiel): ——was a night letter, was it not?

A. Well, it was a telegram——

Q. Well, let me show you——

Mr. Dinkelspiel: May it be stipulated, counsel, the word "NL" appear after "Government"—withdraw that.

A. This was a night letter from Berkeley, California, yes.

(Testimony of Dwight D. Grady.)

Q. From Berkeley, California, which was, received, I take it, on the 14th?

A. On the morning of the 14th. [392]

Q. Being sent on the 13th. Now, the acceptance was not for your entire bid, was it?

A. No, our entire bid was for 10,000 tons, and we received acceptance of 4,330 tons.

Q. And the balance was not sufficiently low apparently to be accepted by the Government, is that correct?

A. Well, our understanding of it was that we were the highest of the competitive bidders to receive an award, and therefore we were awarded only a fraction of our offering.

Q. Just for the purpose of closing this part of the record, is it a fact that you were the lowest of the competitive bidders on the first bidding and the highest of the competitive bidders on the second bidding?

A. Yes, I think—of those that received awards.

Q. Of those that received awards. The awards, according to the announcement of the first bidding, having gone up to $162 a ton, and you having bid $151? A. That's right.

Q. Now, when you made this bid, so that we don't repeat what has gone in before, were there any materially different conditions which influenced you in making your bid?

A. Yes. At about the time the awards were due to be made on the first bid, about September 22 or [illegible] group of processors protested to Washington

(Testimony of Dwight D. Grady.)

against the award of the bids on the grounds that the time had expired for the making [393] of those awards. That had the effect of placing us on notice that when the prices were announced in those awards, if made, that they would become the target for other competitors and that the bids generally would be on the second go around at lower prices than those at which the first awards were made.

Q. Apart from that was there any material change in the circumstances or conditions applicable to your making the bid?

A. No; the program was still in effect and announced on September 5, and we had received no information that there would be any change in it.

Q. At least as far as you knew the program was still in effect?

A. Our information was that that was the program.

Q. And that included a partial absorption of the surplus but not an entire absorption?

A. Still left a surplus in the field, potentially, of 40,000 plus tons.

Q. Did you expect to make a killing under this bid?

A. No, we could not possibly have made a killing on any of these bids, unless the market had gone completely to pieces.

Q. Were you still short at this time?

A. Yes, we were still short then.

Q. I think you answered along that line.

A. Yes.

(Testimony of Dwight D. Grady.)

Q. And what prices would you have to pay to cover the contract? [394]

A. $110 a ton or less.

Q. Was it your considered judgment that could be done if the program continued as announced?

A. Yes, I felt sure it could be done, so did my associates.

Q. And the other people in the industry to your knowledge?

A. Yes, I think so, their bids indicated that. It is not a practice of the industry to go short in the proportions that these sales were being made, and consequently it reflected to me they certainly expected to cover.

Q. There were other successful bidders under both announcements, were there not?

A. Yes, there were 31,000 tons bought in the second purchase and we participated to the extent of 4,000 plus tons so that roughly 26,000 odd tons were awarded to other bidders.

Q. And actually all of those other bidders were at lower prices than under the first bid?

A. Yes, that's correct. That is, all of the successful bidders. [395]

* * *

Mr. Wolkinson: Just a minute, I just wondered how Mr. Grady knew other bidders were short.

The Witness: You want me to answer that?

Q. (By Mr. Dinkelspiel): Answer it, Mr.

(Testimony of Dwight D. Grady.)

Grady. He knows the answer, but tell it to him again.

A. I just said that we have a field crew of buyers calling on growers. We knew that they were having the same success that we were having. Our people were reporting to us daily movements. They told us that nobody was able to buy and nobody was buying. They were attempting to buy. But there was a complete standstill in movement and a decided demoralization. Packers generally were talking about the program, and I was informed—they informed me, some of them, that one of the things they objected to was the forced short selling that this [396] program required. As far as our bids are concerned the matter—it is a matter of simple mathematics. If we offered 10,000 tons and received awards of only 4,330 tons, and that all of the 31,000 tons was bought, others must have sold at lower prices than ours, or we would have received an award of the 10,000 tons that we offered.

Q. Mr. Grady, a general question, had there been any announced change or change announced and reported to you in the program of the Department prior to October 14, 1947, since the announcement thereof on September 5, 1947?

A. No, there had never been any announcement made. There were rumors that there might be a change, but there was no announcement that any change would be made until we received advice on the 14th of October.

(Testimony of Dwight K. Grady.)

Q. Now, did these rumors relate to that "Setrakian pressure" you were talking about?

A. Yes, there was a large mass-meeting, an overflow meeting in Fresno in the very early days of October, about October 1, in which the matter went into politics in the sense that Congressmen and Senator Downey were called into the meeting and asked to intercede with Washington in an effort to effect a change in the program. [397]

* * *

Direct Examination
(Resumed)

By Mr. Dinkelspiel:

Q. Mr. Grady, we had reached the point in your examination yesterday where your company had made the second bid and received a telegram awarding it 4,330 tons purchased by the Commodity Credit Corporation. That was by Night Letter which is in evidence, dated October 13, and delivered to you on the morning of October 14.

What if anything did you learn on the morning of October 14, as to any change of Government program?

A. I received information to the effect that the program would be changed and that announcement would be issued to the effect that an additional 60,000 tons of raisins would be purchased.

Q. How did you receive this information?

A. I received it by telephone call first, and later it came out in the local newspapers. [403]

(Testimony of Dwight K. Grady.)

Q. And the telephone call was from a Government official or somebody in the industry, or a banker? A. It was from a banker.

Q. Banker. And then it came out of the newspapers, is that correct?

A. That's correct.

Q. And what did you do?

A. I immediately caused a wire to be sent to Secretary Anderson advising him that we had offered raisins and sold raisins to the Government in reliance upon the promises made with respect to the program, that is the 61,000 ton purchase, and that to fulfil those contracts would cause us very serious losses and, therefore, I was requesting cancellation of the two contracts.

Q. I show you what purports to be a copy of such a wire dated October 14, 1947, and ask you whether the wire you sent was the original of that document?

A. Yes. This is a copy of the wire that I sent to Secretary Anderson in Washington, D. C.

Q. The pencil interlineations reflect the actual wire that was sent, do they not?

A. Yes, these were corrections and additions I made after the wire was typed.

Q. And before it was sent?

A. And before it was sent. [404]

Mr. Dinkelspiel: I offer this in evidence as plaintiff's exhibit next in order.

The Court: May be marked.

(Testimony of Dwight K. Grady.)

The Clerk: Plaintiff's Exhibit No. 17 in evidence.

(Whereupon, night letter referred to above, was marked Plaintiff's Exhibit No. 17 and admited into evidence.)

Q. (By Mr. Dinkelspiel): I note that this wire was sent to Secretary Anderson: that was true, was it? A. Yes, that's correct.

Mr. Wolkinson: I do.

The Court: You admit the receipt of this wire?

Q. (By Mr. Dinkelspiel): And the wire expressed the views of your company at that time?

A. Yes, that is correct.

Q. And where it states facts it states facts then known to you to be true?

A. That's right.

Mr. Dinkelspiel: Your Honor has already read the wire; it would serve no purpose by examining the witness on it.

The Court: You wish to read the wire into the record?

Mr. Dinkelspiel: Yes, I think I will, your Honor.

Via Western Union, charged to account of R. B. & Co., to Honorable Clinton P. Anderson, Secretary of Agriculture, Washington, D.C., dated, October 14, 1947.

"It is reliably reported that you intend [405] announce offer to purchase by competitive bids from producers or owners thereof 60,000 tons additional raisins beyond 61,000 tons already awarded processors as result of competitive bidding. Our

(Testimony of Dwight K. Grady.)

raisins sales to Commodity Credit Corporation were made on basis of our reliance on your announcement of September 5th and later invitation to bid establishing limits on quantities of intended purchases. Therefore in making bids, our offers took into consideration known size of crop, your declaration that no support price would be established, specific request of departmental officials for our cooperation, need for re-establishing domestic consumption in maximum volume.

"In addition we kept officials your department informed of short-position in which processors found themselves as result of growers' refusal to sell raisins in face of Commodity Credit Corporation's competitive purchasing methods. Domestic trade has responded substantially to offerings of raisins at price levels resulting from your purchase program. We, and no doubt others, have booked thousands of tons as result. If you now announce changed program we face probable loss of hundreds of thousands of dollars as result of squeeze in field through no fault of our own but which penalizes us solely [406] because of changes now indicated after officials your Department repeatedly insisted there would be no change. This latter insistence strongly influenced us in making our offers.

"We recognize character of influence exerted upon you in connection with this program but respectfully point out that announced decision to change program most unfairly injures those called on to cooperate in making program effective in removing surplus raisins from contract.

(Testimony of Dwight K. Grady.)

"Under the circumstances we respectfully request cancellation by you of sales we have made to Commodity Credit Corporation of 10,000 tons sold it September 24th under A6PM(ff)1647 and award of 4,330 tons made us October 13 under A6PM(ff)1893."

Q. Those are contract numbers, are they not?

A. Yes.

Mr. Dinkelspiel (Continuing):

"We wish to point out that even with this cancellation we still will suffer probably serious loss on sales already made in domestic market.

"Respectfully, Rosenberg Bros. & Co."

Q. (By Mr. Dinkelspiel): Just one question on the wire.

When you say: "We recognize character of influence exerted upon you in connection with this program," were you [407] referring to the inference of the growers? A. Yes.

Q. Of which Senator Downey testified?

A. That is right.

Q. Mr. Setrakian——

A. That is right, the great disturbance that had taken place, the activity of Mr. Setrakian, the fact that the mass meeting had in effect delegated Senator Downey to go to Washington and undertake to get the program changed.

Q. And political speeches?

A. That's right.

Q. Representative Martin, for example, and others?

(Testimony of Dwight K. Grady.)

A. Yes, there was tremendous pressure built up.

Q. Now, Mr. Grady, did you receive a reply to that wire on October 14 or 15?

A. No, I did not.

Q. I will ask you whether you sent a second wire? I show you another wire, copy of a wire, and ask you if the original of that also was sent to Secretary Anderson?

A. Yes, this is the wire that I sent Secretary Anderson on October 15.

Q. October 15.

Mr. Dinkelspiel: And counsel agrees that this was received by the Secretary?

Mr. Wolkinson: Yes. [408]

Mr. Dinkelspiel: Mr. Wolkinson?

Mr. Wolkinson: Yes, sir.

Mr. Dinkelspiel: I offer it in evidence, your Honor, next in order.

The Court: There is no objection to secondary evidence, is there?

Mr. Wolkinson: No, your Honor.

Mr. Dinkelspiel: We have stipulated to that, your Honor, and are willing to stipulate.

The Court: It may be marked in evidence.

The Clerk: Plaintiff's Exhibit No. 18 in evidence.

(Whereupon telegram referred to above was marked Plaintiff's Exhibit No. 18 and admitted into evidence.)

Mr. Dinkelspiel: This wire, also to Secretary

(Testimony of Dwight K. Grady.)

Anderson, dated October 15, 1947, reads as follows, your Honor:

"To Honorable Clinton P. Anderson, Secretary of Agriculture, Washington, D. C., October 15, 1947.

"Supplementing our wire October 14th requesting cancellation of our Commodity Credit Corporation raisin contracts wish to advise that in consideration of your agreement to so cancel we are willing to cancel our existing grower contracts for natural Thompsons, sweat box, that call for firm prices of less than $140 ton so that such growers may enjoy benefits of your announced new purchase program. [409]

"We respectfully suggest that such action would lead to correction of inequities that at present seem threatening.

"Respectfully, Rosenberg Bros. & Co."

Q. (By Mr. Dinkelspiel): Will you state to his Honor why you sent that wire?

A. Well, the dissatisfaction with the program was because of the price level to which raisins had descended following the announcement of the program.

The bidding by successful bidders in both of the invitations aroused a storm of criticism. It was generally understood and I understood that the price levels that would be reflected by such sales would be damaging to the grower interest.

In order to avoid any suggestion that the company would take advantage of any low priced contracts

(Testimony of Dwight K. Grady.)

that it might have, we felt that the equitable thing to do, in order to reflect the intended benefits of the program to the growers in a price sense, that we should offer to cancel our contracts and then to go out and try to buy grower raisins at $140 a ton which would have set the market price in that neighborhood, either $140 or higher, depending upon the competitive activity, but that a price of $140 a ton, while not meeting the published objectives of the Raisin Producers Association and Mr. Setrakian, still would reflect a satisfactory return to [410] growers on their surplus raisins and would set the foundation for the balance of the raisins which were intended to go into commercial distribution, and that in turn would result in a satisfactory financial return to raisin producers in the San Joaquin Valley.

Q. You could only do this without suffering substantial loss if your contract were cancelled?

A. I didn't quite——

Q. You could only go out and buy at $140——

A. Oh,——

Q. ——a ton if your contract with the Government were——

A. Yes, our sales are predicated on buying, being able to buy raisins under the supply situation then existing in the neighborhood of $110 a ton. So that our offer was an offer to raise the existing price level from $110 to $140, or $30 a ton.

Q. Illustrative of how serious the situation was,

(Testimony of Dwight K. Grady.)

would you mind mentioning what, if you know, bid Sun-Maid Raisin Association made for the first lot of raisins?

A. Sun-Maid bid, if my recollection is correct, it was very close to our own bid and as I remember it, 12 cents a ton difference.

Q. 12 cents a ton, not a pound?

A. No, 12 cents a ton difference, which meant a very small fraction of a penny per pound. [411]

Q. And you were the low bidder on that first lot of bids?

A. The company, Rosenberg Bros., was the low bidder.

Q. There is some importance to that, is there not, the fact that Sun-Maid Raisin Association was both a producer and a grower? A. Oh, yes.

Q. Producer and a processor.

A. Sun-Maid, having its raisins under contract, makes advances of only a part of whatever the estimated value of the crop may be, perhaps 25 per cent, perhaps 50 per cent under certain conditions. It sells the raisins and after deducting costs of doing business as a processor and marketing agency, the residual is distributed to its grower members. But it nevertheless is in the position of having to be competitive, and in being competitive it must participate in its share of the business, and I presume that such motives caused it to bid as it did, because the bid was very close to our own, and apparently arrived at in about the same way we arrived at our bid.

Q. Yes. So that the Sun-Maid Raisin case, that

(Testimony of Dwight K. Grady.)

really reflected a grower as well as a packer market, did it not? A. Yes.

Q. They were selling their raisins as growers and also as packers?

A. Sun-Maid Raisin Growers handle only the production of its members. [412]

Q. I show you a mimeograph of a Washington release and ask you if you received a similar—to your company, I use you and your company sort of indiscriminately here, but I mean Rosenberg Bros. & Co., received a mimeograph to that effect from the Department of Agriculture, that being a mimeograph dated October 14, 1947?

A. Yes, we did receive a copy of this.

Q. That was the announcement of the new program?

A. This is the announcement of the intention of the Commodity Credit Corporation to purchase an additional 60,000 tons over and above the original 61,000 tons already purchased.

Mr. Dinkelspiel: I offer this, if your Honor please, as an exhibit next in order.

The Court: I note in here it mentions the 31,000 tons announced today were bought at prices ranging up to $149.40 per ton.

The Witness: Yes, sir.

The Court: You saw that statement?

The Witness: Yes, sir.

The Court: What significance did that have?

The Witness: It meant that Rosenberg Bros., whose price was $149.40, and they were given an

(Testimony of Dwight K. Grady.)

award of 4,330 tons, was the high bidder, and everybody else bid below that.

Mr. Dinkelspiel: That, your Honor, is the packed processed price, $40 above the grower prices we have been [413] talking about.

The Court: May be marked.

The Clerk: Plaintiff's Exhibit No. 19 in evidence.

(Whereupon, announcement was marked Plaintiff's Exhibit No. 19 in evidence.)

Q. (By Mr. Dinkelspiel): I notice that this announcement states that "United States Department of Agriculture announced today, October 14, that the Commodity Credit Corporation had bought an additional 31,000 tons of Thompson Seedless Raisins."

That was part of the lot, your 4,330 tons, was part of that lot, is that correct?

A. Yes, sir, that is correct.

Q. And then in the same sentence: "And that producers and others in physical possession of raisins at the time they submit their bids will be invited to offer immediately another 60,000 tons"?

A. Yes, sir.

Q. So it is true, is it not, that this announcement combined in the very first sentence announced that it had completed its purchases from the packers under the foregoing program, and that it will immediately start to buy another 60,000 tons?

(Testimony of Dwight K. Grady.)

A. Yes, that is correct, and buy them from the producers upon whom we were relying for our supply.

Q. So as stated in the very opening sentence they were now going to buy, not from packers, but from producers, the [414] additional quantity of raisins?

A. They were going to buy both from packers and producers.

Q. No, not in this opening statement, from producers and others in physical possession.

A. Well, that any other might be a packer having physical possession.

Q. But not a packer in a short position, such as Rosenberg Bros.?

A. No, I wouldn't think so.

Q. That would not be physical possession.

Now, I think His Honor mentioned earlier, or maybe it was you who mentioned, that this then put the Department of Agriculture in competition with the packers in buying from the growers, isn't that correct? A. That is correct, yes.

Q. So not alone was this a change in program of buying an additional quantity beyond that originally contracted for, but it was buying in competition?

A. That's right.

Q. From the very source, and your only source of supply? A. That is correct.

Q. The announcement also states that the 31,000 tons announced today is an addition to 30,000 tons previously bought through September, September 25th.

(Testimony of Dwight K. Grady.)

Can I see that Exhibit file? [415]

The reference to September 25 is obviously, is it not, to Exhibit 13, when the announcement of the first purchase of 31,000 tons were made?

A. Yes, this was an announcement of purchases made at that time.

Q. And it is to be noted, is it not, that it announces purchases made of 31,000 tons in accordance with the program, I quote, "Program announced by the Department, September 5, 1947"?

A. Yes, that is the reference contained in the mimeograph.

Q. So now we have in the later mimeograph, the one of October 14, 1947, Exhibit No. 19, the additional 30,000 tons as being purchased—31,000 tons being purchased in addition to those previously bought on September 25 and referred to in the prior mimeograph as part of the program of September 5, 1947?

A. Yes, sir; that's correct. [416]

* * *

Q. (By Mr. Dinkelspiel): Mr. Grady, it is true, is it not, that Rosenberg Bros. in the month of October, early in October, was acquiring some raisins although maybe not in great quantities?

A. Yes, that's correct.

Q. Do you recall what the last price at which Rosenberg Bros. & Co., acquired raisins on the 13, if they did acquire them, on or about the 13th of

(Testimony of Dwight K. Grady.)

October, and I am intentionally saying immediately before the announcement of the program?

A. The market was $110—very close to $110, and we were trying to buy at that price and did buy a few raisins at that price.

Q. You did buy a few raisins at that price?

A. Yes. [418]

The Court: You mentioned yesterday some four hundred odd tons.

A. During the month of October.

Mr. Dinkelspiel: Admittedly, a small quantity, your Honor.

Q. (By Mr. Dinkelspiel): The market was at that price? A. Yes.

Q. $110. About.

Now, Mr. Grady, what happened to the market immediately after the announcement of the Secretary, the announcement by the Secretary of the change in program?

A. The first effect was to give great confidence to producers, and the market commenced to go up. There were actually very few transactions at the time, either purchases or sales, because of the demoralized situation in the market. [419]

* * *

Q. (By Mr. Dinkelspiel): Now you say that immediately after the announcement of the program, the market was in a state of inactivity or confused?

A. That's correct. It was a demoralized market.

(Testimony of Dwight K. Grady.)

Things practically came to a standstill during this period, and the announcement of an additional purchase was hailed as good news by producers, and their attitude toward selling their [420] raisins stiffened very appreciably.

Q. Did your company continue in its efforts thereafter to acquire raisins?

A. Yes. The company consistently tried to buy raisins right from the beginning of the season, straight through ensuing months of October, September, December, and so on.

Mr. Dinkelspiel: We will put in the details later, your Honor, but I think this witness might answer one general question.

Q. (By Mr. Dinkelspiel): Do you know at or about what prices on the weighted average Rosenberg Bros. was buying raisins after the announcement of this program and up to the early part of January?

A. Yes, the average price was above $133 a ton.

Q. That's for the natural raisins?

A. That's for the grower's raisins in sweat box, natural condition.

Q. And adding the $40 for preparation, et cetera, will be equivalent to $173 per ton on the Government sale? A. Yes, that is right.

Q. So there was a differential of $23 or more dollars? A. That's right.

Q. Between your price and what——

A. ——it cost us to cover those commitments.

Q. That's right. Now, Mr. Grady, there was

(Testimony of Dwight K. Grady.)

some question [421] raised, was there not, about your making deliveries at this time, some communications with the local office? A. Yes.

Q. I show you a letter, carbon copy of a letter addressed to the Chief, San Francisco Field Office, under date of October 21st, over the signature of Rosenberg Bros., and ask you if you sent that letter?

A. This was a letter sent by the head of our shipping department to the Shipping and Storage Branch in San Francisco, and advised that we were unable to make delivery pursuant to their request.

Mr. Dinkelspiel: This letter was received, was it not, Mr. Wolkinson?

Mr. Wolkinson: Yes, sir.

Mr. Dinkelspiel: I offer it in evidence, your Honor.

The Court: It may be marked.

The Clerk: Plaintiff's Exhibit No. 20 in evidence.

(Thereupon, letter dated October 21st, from Rosenberg, to Shipping and Storage Branch, San Francisco, received in evidence and marked Plaintiff's Exhibit 20.)

Mr. Dinkelspiel: Plaintiff's Exhibit 20 reads as follows: (Reading.)

"October 21st, 1947.

"Chief, San Francisco Field Office, Shipping and Storage Branch, PMA, U. S. Department of Agriculture, [422] 827 Market Street, Room 615, San Francisco 3, California." From the address it ought to have gotten there.

(Testimony of Dwight K. Grady.)

"Gentlemen:

"Attention Mr. P. J. Pingatore.

"This will confirm our telephone advice of this morning to the effect that we will be unable to make deliveries of raisins against Contract A6PM (FF) 1647 as instructed in your notice to deliver FKMA 50568-C, dated 10/16/47.

"Our inability to make deliveries is due to the confused situation in the San Joaquin Valley resulting almost in total stoppage of movement of raisins into our Fresno plant.

"Yours very truly, Rosenberg Bros. & Co."

Q. (By Mr. Dinkelspiel): That is a correct statement, is it, "the inability was due to the confused situation in the San Joaquin Valley resulting in an almost total stoppage of movement of raisins" into your Fresno plant?

A. Yes, that was the condition at the time.

Q. The contract A6PM(FF)1647 was the first——

A. That's right—was the sale of 10,000 tons.

Q. ——first bid of sale.

Now, had you by the end of October received any reply to your telegrams to Senator Anderson?

A. I don't believe that I did. [423]

Q. I will show you a telegram dated October 31 addressed to Honorable Clinton P. Anderson and ask you if you sent that to the Secretary.

I will ask Mr. Wolkinson whether that telegram was received.

Mr. Wolkinson: It was.

(Testimony of Dwight K. Grady.)

Q. (By Mr. Dinkelspiel): That telegram was sent? A. Yes, sir.

Q. And it is stipulated that it was received?

A. That's correct.

Q. State the circumstances under which you came to write a telegram, particularly one of such length.

A. Well, I was extremely distressed at the loss confronting the company and our apparent inability to get relief by cancellation of these contracts. Therefore, I attempted to give the Secretary, Mr. Anderson, who was at the time in Albuquerque, New Mexico, as complete a presentation of the situation confronting us as I was able to draw, and this wire embodies the statements made to the Secretary at that time.

Q. The previous telegram to Secretary Anderson having gone to Washington?

A. Yes, that's correct.

Q. And this correctly sets forth your views and the facts as you knew them as of the date of the telegram?

A. Yes, that's correct, or I wouldn't have [424] signed it.

* * *

Q. (By Mr. Dinkelspiel): Did you at or about this time get in communication with Senator Downey?

A. I got in communication with Senator Downey two or three days after October the 14th—that is, about the 16th, I believe, or the 17th.

(Testimony of Dwight K. Grady.)

Q. I am showing you; for the purpose of tying in the record—I show you a carbon copy of a letter addressed to Senator [425] Downey dated November 3, 1947, and ask you whether you sent the original of that?

A. Yes. I sent this letter to Senator Downey, enclosing a copy of the telegram that I have just identified as having been sent to Secretary Anderson in Albuquerque on October 31.

Q. So accompanying that letter to Senator Downey was a carbon copy or a copy of that lengthy telegram, Plaintiff's Exhibit 21, which His Honor is reading? A. That is correct.

Q. And you had, prior to that time, had some conversation with Senator Downey, had you not?

A. Yes. I had reported to Senator Downey the view of the company with respect to cancellation of the program and was seeking his assistance in getting such an arrangement made.

Mr. Dinkelspiel: I offer in evidence this letter of transmittal as Plaintiff's Exhibit 22.

The Court: It may be marked.

The Clerk: Plaintiff's Exhibit 22 in evidence.

(Thereupon, letter of transmittal from Rosenberg to Senator Downey dated November 3, 1947, admitted in evidence and marked Plaintiff's Exhibit No. 22.)

Mr. Dinkelspiel: This being short, I can read it. It is dated November 3, 1947. (Reading.)

(Testimony of Dwight K. Grady.)

"Honorable Sheridan Downey, Post Office Box 786, [426] San Francisco, California.

"Dear Senator Downey:

"Pursuant to conversation with your office today, I am enclosing copy of a wire sent to Secretary Anderson at his office address in Albuquerque and a copy airmailed to his Washington address. I have had no reply, but I believe the wire faithfully records the facts."

Q. (By Mr. Dinkelspiel): By "that wire" you mean the wire that His Honor is reading, Plaintiff's Exhibit No. 21? A. Yes, that's correct.

Mr. Dinkelspiel: (Reading.)

"In the meantime the raisin business is paralyzed."

Q. (By Mr. Dinkelspiel): Is that right?

A. Yes, that's right.

Mr. Dinkelspiel: (Reading further.)

"Incidentally, I am planning on leaving here for Washington on November 6th and expect to be at the Mayflower Hotel during the week of November 9. If there are any chores you would like to have me do, please command me.

"Yours very sincerely, Dwight K. Grady."

Q. (By Mr. Dinkelspiel): So up until that time you had not heard from Senator Anderson; you had sent him (recapitulating now) the telegrams of October 14th and 15th and then the [427] lengthy telegram of October 31? A. That's correct.

Q. You had in the meantime asked Senator Downey, who had been so effective in the program for the

(Testimony of Dwight K. Grady.)

growers, to be of assistance to you and the other packers—— A. Yes, sir.

Q. ——in the dilemma you were in?

A. That's correct.

Q. And you communicated with his office in San Francisco and they had apparently told you to send the facts on to the Senator, is that correct?

A. Yes, that's right. I talked to his secretary in San Francisco.

Q. Now then, as announced in that letter, you were going to take the matter up personally in Washington to see if you could get relief, is that correct?

A. Well, I said that I was going to Washington and would be there on the 9th of November.

Q. Up to that time you still had not heard from the Secretary? A. That is correct.

Q. I show you a telegram, Government day letter paid, apparently from Clinton P. Anderson, and ask you if you received that communication—ask you whether your company received that communication; first? [428]

A. Yes. Well, this is a wire addressed to me and I did receive it.

Q. Do you recall just——

A. Received it in the office of the company.

Q. Well, actually, Mr. Grady, wasn't that sent to you while you were on the train on the way east?

A. Yes. As I recall it was forwarded to me by relay.

(Testimony of Dwight K. Grady.)

Q. Relayed. Actually a telegram to that effect. (Showing witness another telegram.)

A. Yes. This wire was in the office and it was relayed to me.

Mr. Dinkelspiel: Its sending is admitted, its receipt is admitted.

I will offer it.

The Court: It may be marked.

Mr. Wilkinson: No objection.

The Clerk: Plaintiff's Exhibit No. 23 in evidence.

(Thereupon, telegram dated November 6, 1947, Government day letter paid, to Dwight K. Grady, Rosenberg Bros. & Co., received in evidence and marked Plaintiff's Exhibit 23.)

Mr. Dinkelspiel: This is Plaintiff's Exhibit No. 23, sent from Washington, D. C., November 6, 1947, Government day letter paid.

"Dwight K. Grady, Rosenberg Bros. & Co.

"Thanks Ur Tel relative raisin purchase [429] program. Objective this program is and has been to remove raisin surplus and permit remainder of supply flow in normal commercial trade channels at prices established by the industry. Announcement and offer forms for use producers and others in making offers on additional 60,000 tons now being distributed.

"Believe it advisable await return of offers before

(Testimony of Dwight K. Grady.)

determining whether purchase program should be changed.

"Unable grant your request for cancellation of raisin purchase contract between your firm and Commodity Credit Corporation.

"Signed Clinton P. Anderson, Secretary."

Q. (By Mr. Dinkelspiel): Is that the first notice you had of the rejection of your request for cancellation? A. Yes, it was.

Q. That was on November 6—or the telegram is dated November 6, 1947—in response to previous telegrams which you had sent, first of which were sent on October 14, 1947? A. That's right.

Q. Now, Mr. Grady, did you meet with Senator Anderson or with any other members of the Department of Agriculture on the occasion of your visit to Washington after the date mentioned in that telegram?

A. Yes, I did. I met with Mr. Graham, Mr. Smith and a number [430] of other personnel of the Fruit and Vegetable Branch.

Q. Where—Pardon me.

A. It was in the South Building, Department of Agriculture Building, in Washington.

Q. Did you meet with them together or separately?

A. I met with them both separately and together and I also met with Secretary Anderson.

Q. Were your meetings with Mr. Graham and Mr. Smith prior to your meeting with the Secretary or not?

(Testimony of Dwight K. Grady.)

A. Yes. Yes, they were prior to the meeting with the Secretary. I did see them later as well.

Q. Could you approximate the date or dates?

A. Yes. I was in Washington on other business and I met with Mr. Graham late in the week following November 9th of my arrival in Washington, and I believe that I met with Mr. Smith and a committee representing the Prune industry along about the 17th or 18th of November, and an appointment was arranged at that time for me to discuss with Secretary Anderson the raisin program.

Q. Did you have any discussion with Messrs. Smith and Graham about the raisin program?

A. Yes. Not in exact particulars except to say that the program had been very damaging to my company and that we hadn't yet decided what we were going to do about it and the suggestion was made that perhaps I should talk with the [431] Secretary.

Q. And you talked with the Secretary on what date, if you recall?

A. I think it was November 19th.

Q. You ought to remember the date. That's my birthday.

But go ahead, Mr. Grady; how long was your conference with the Secretary on that occasion?

A. I met with the Secretary at eleven in the morning and the conference broke up at one in the afternoon, a matter of two hours.

Q. I assume and know from what you told me

(Testimony of Dwight K. Grady.)

that a great deal was said and quite a frank exchange had between you and the Secretary?

A. Yes. The Secretary was gracious enough to invite me to let my hair down and to speak on a man-to-man basis, and that was the way we discussed the raisin program.

Q. And you explained to him your points of view with respect to the program?

A. Yes, I think in considerable detail.

Q. And he expressed his point of view?

A. The Secretary explained to me the position that he had taken and why he had taken it.

Q. And was anything said to you with respect to adjusting your problems or the granting of relief of any kind?

A. Not directly. The conference was terminated by a very [432] important call to the Secretary, and he suggested that I then go before the Commodity Credit Board of Directors and discuss the matter there, and at my suggestion he instructed his Secretary to make an appointment for me with that Board for later in the day.

Our conversation, that is the conversation with the Secretary, that he was having with me, as I say, was suddenly terminated.

Q. And did you go before the Commodity Credit Board? A. Yes, I did.

Q. Who constituted that Board at that time?

A. Jess Gilmore was presiding at the meeting. I don't recall all of the personalities present. There were a number of them. Mr. F. S. Smith was pres-

(Testimony of Dwight K. Grady.)

ent, Mr. Dave Davidson was present; as I recall it, a man named Harrison was present, and there were others, I think somebody from the Solicitor's Office, a quite a number of staff men, discussed the matter with me.

Q. What was the nature of the discussion as it affected your company?

A. Well, the nature of the discussion related to the raisin program, how it had been set up, the industry's position. It was pretty much a review of the whole program.

Q. Was any suggestion made as to relief for the packers?

A. I made suggestions for relief to the packers, and I was [433] finally advised at the close of the meeting that while there was considerable disagreement as to what might be done with me, with my company, that there were now sent invitations to bid on the second 60,000 tons and it would be preferable to await the results of those invitations before considering this matter any further.

I asked them if it would be advisable for me to remain in Washington or should I go to New York where I had planned to be and back to California, and they said: "We haven't any suggestion. You use your own judgment in that respect." And I left Washington.

Q. Was there now a subsequent announcement from the Department of Agriculture relating to the raisin program—in this connection? I am showing

(Testimony of Dwight K. Grady.)

you a release dated Washington, November 26, 1947. Do you recall that release?

A. Yes. I saw this release.

Q. Your company received it?

A. Yes. [434]

* * *

Mr. Dinkelspiel: Before questioning Mr. Grady about Exhibit 24, and as Exhibit No. 25 is largely explanatory, I will read it, if you will follow me. It is a release, United States Department of Agriculture, Production & Marketing Administration, Washington, October 17, 1947.

"USDA announces further details of current raisin purchase program.

"The United States Department of Agriculture today announced further details of the dried fruit purchase program which was originally announced on October 14, 1947. In purchasing the additional 60,000 tons of raisins involved in this purchase [435] program, offers will be invited (Figure 1) from producers for raisins in natural condition or processed-packed form, and (2) from others than producers for raisins in process-packed form.

"All purchases will be made by the acceptance of offers on a bid basis. Processors will also be invited to submit offers for processing and packing the natural condition raisins purchased from producers by the Commodity Credit Corporation.

"Further details will be announced soon, and announcement and offer forms will be made available.

"Purchase of this additional 60,000 tons of raisins

(Testimony of Dwight K. Grady.)

will bring to 120,000 tons the total purchases by CCC under the current program."

Q. Now, I am going to ask you, if you will, to refer to Plaintiff's Exhibit No. 24, and propound one or two questions with respect to it.

You will note it states that: The Department announces that under the program announced October 17, which, as I have indicated from reading the announcement, is merely a restatement of the program of October 14 with which you are familiar?

A. Yes, that's correct.

Q. The Commodity Credit Corporation purchased 19,541 tons of [436] Thompson Seedless Raisins. You will note that is far short of the 60,000 tons announced in the program?

A. Yes, that's correct.

Q. And that the price at which the packed-processed raisins were purchased was $171.46 per ton average as compared with the 20 or more dollars cheaper prices at which the Government had purchased from you and other processors?

A. Yes, that's correct.

Q. Do you know what happened in that period that the Government only purchased 19,000 tons at this rather high price?

A. The offers were made, or invitations to offer raisins were sent to processors and were made available to producers who might elect to make offers.

This announcement says that they were able to buy 19,541 tons of packed-processed Thompson's; that producers offers of natural condition raisins

(Testimony of Dwight K. Grady.)

were not accepted, and that all such offers, including prices in excess of $135 a ton. This action made it necessary for CCC to reject processors' offers, also to exchange packed-processed raisins for natural condition raisins, which was the method of implementation of the announcement that they would accept bids from processors to pack and process the natural condition raisins, if any, that were procured from producers.

Q. Now, Mr. Grady, according to this announcement, and I will ask you whether it is also your knowledge, that the Government [437] rejected bids of producers themselves in excess of $135 per ton?

A. Yes, that's in their own declaration in this bulletin.

Q. And that was common knowledge in the industry at the time was it?

A. Yes, we understood that prices that producers were asking were considerably out of line with what appeared to be the objective of the program in terms of prices to growers.

Q. So that in the intervening time between October 14, or October 17, whichever date you want to fix for the inauguration of the program, and this announcement of November 26, there were only some 19 and a half thousand tons purchased, and the prices had gone up $20 a ton and more for the packaged-processed raisins?

A. Yes, that is correct.

Q. And that producers were offering to sell to

(Testimony of Dwight K. Grady.)

the Government at over $135 per ton for the natural raisins as compared to $110 or thereabouts of the market on October 13, 1947?

A. That's right, yes.

Q. Now, this also inaugurates a new program, does it not, this release of November 26, that is, what the Department would require of processors in buying from them in the future?

A. Yes, the Department announced the future purchases would contain in them a requirement that those receiving goods would certify that they had paid producers $135 a ton; that is, less than $135 a ton. [438]

Q. Mr. Grady, we started out with you earlier in your testimony with your defining the difference between a purchase program and a price support program.

What are the characteristics of this program announced in the November 26 release?

A. This became substantially a price support program, because it named a minimum price that growers were required to receive before any bidders could receive an award.

Q. Now, after November 26——

The Court: Pardon me, at this very juncture, so I can coordinate my thinking as we go along, at this very juncture what was your short position? Could you determine it?

The Witness: On November 26?

The Court: Yes.

The Witness: I would say that we must have

(Testimony of Dwight K. Grady.)

been short on this sale and other sales at least 10,000 tons.

Mr. Dinkelspiel: We will produce——

The Court: You will pardon my interruption, I am not trying to pinpoint nor commit the witness to any particular figure, but I am trying to coordinate as you go along and I constantly have in mind, naturally, the position you found yourself in.

The Witness: Yes.

The Court: Now, that short position is reflected in terms of your commitments under the several bids which we have had [439] under discussion, as well as domestic requirements?

The Witness: Yes.

The Court: Is that correct?

The Witness: Yes. You see, we don't do business only with the Government.

The Court: I understand that.

The Witness: Our job is to serve the public actually——

The Court: I understand.

The Witness: In this sense we were an instrumentality, or one of them through which the program was implemented.

The Court: You say you were then short approximately 10,000 tons?

The Witness: Yes. Our position, your Honor, was that we had bought around 400 tons in the months of September and October. We were able to acquire about 10,000 tons in the month of November. So our net position in acquisitions was about

(Testimony of Dwight K. Grady.)

10,500 tons in rough figures. We had commitments of 14,330 tons on this particular business, and of course we have our requirements to satisfy our customers in the form of bakers, chains, wholesale grocers and the like. So that my estimate now is that we must have been short at November 26 in a quantity of about 10,000 tons.

The Court: This question will be asked you, no doubt, either by Mr. Dinkelspiel or on cross-examination: How did you attend your allocations of the raisins that you were acquiring [440] progressively, as you have indicated?

The Witness: We acquire raisins to meet our commitments at the time we have commitments. So that our whole effort is directed toward covering the sales that we have made at a satisfactory basis from the standpoint of a business operation.

When we make a sale we try to buy raisins to cover that sale, and so on. It is almost a continuous whirl which you go through in complete sequence, and our—and to minimize any risk, the saying in the business is the first loss is your best loss. The way to minimize any risk is to buy as rapidly as you can to cover your commitments.

The Court: And with the price pegged at $135, or established at that price as a minimum, prospects of buying in the open market at a lower price from the producer was practically nil?

The Witness: Yes, so long as—it was very dim indeed, so long as that kind of an offering was out, and this thing told us that there were still more than

(Testimony of Dwight K. Grady.)

40,000 tons to be bought under the program at a price of $135.

Now, a volume of business supported at that price means that the whole price becomes supported. The market price and commercial sales reflects the same kind of a basis. [441]

* * *

Q. (By Mr. Dinkelspiel): Now, Mr. Grady, what next transpired in this matter? We are now up to November 26. Am I correct in suggesting to you that the next thing you heard was a telegram from Mr. Dave Davidson?

A. Yes, I believe that is correct.

Q. Who was he?

A. Mr. Dave Davidson was an associate in the Commodity Credit Board at that time. He had been, we call it, an AAA man in California, and had taken up his offices in Washington and was working there at the time this took place.

Q. Had Mr. Dave Davidson's name come into this picture before? Had anybody told you that he was going to be the man to contact you?

A. Well, Mr. Davidson was one of those present at the meeting that I had with the Board following my meeting with the Secretary. He was present at that meeting.

Q. But I had in mind the possibility that someone may have told you——Or state whether this is true or not, that he [433] would be in touch with you, either the Secretary or the Board people?

A. I didn't recall that particular thing. He was

(Testimony of Dwight K. Grady.)

actively interested, however, as evidenced by that telegram.

Q. I am in error, so we won't pursue that any further.

However, you did receive this telegram dated December 2, night letter, which I assume you received on the 3rd of December? Do you recall it?

A. Yes, I recall that wire.

* * *

Mr. Dinkelspiel: I will read, if your Honor please.

"Government night letter paid, Washington, D.C.

"Dwight K. Grady, Rosenberg Bros. & Co., 230 California Street, San Francisco.

"Commodity Credit Corporation has given consideration to representations made by you while here and regrets that it cannot comply with your [444] request. Corporation considers contracts entered into with Rosenberg Bros. & Co. and other raisin processors and packers pursuant to announcement Nos. 1 and 2 to be in full force and effect and will expect delivery thereunder. Signed: Dave Davidson, Administrator."

Q. (By Mr. Dinkelspiel): What did you do upon receipt of this telegram, if anything?

A. I immediately tried to contact Secretary Anderson by telephone on November 3. I was unable to contact him.

Q. December 3?

A. December 3, pardon me.

(Testimony of Dwight K. Grady.)

I was unable to contact him on that day, but a response to my call came in at 4:30, about 4:30, San Francisco time, which meant about 7:30 Washington time, with Secretary Anderson on the telephone.

Q. On what date?

A. On December the 4th, on the date following the receipt of that wire.

Q. Will you state the substance of that conversation, if you can?

A. Yes. I introduced myself on the telephone, and Secretary Anderson said:

"I know what you want to talk about, Mr. Grady, and I will save your time. We understand that [445] you have legally valid points and we will have the Solicitor——"

I am paraphrasing this. It's about what he said, but there might be a word or two——

"——we will have the Solicitor's office make such a finding and we will then work out a formula which will not give you a profit but will save you from loss, and then when we have a formula we can work it out for Sun-Maid and the rest."

And I said:

"That's fair enough, Mr. Secretary. I will start shipping."

And he said:

"No, don't ship on any understanding."

He said:

"Let the boys work this out."

And I said:

(Testimony of Dwight K. Grady.)

"By whom do you mean 'the boys'?"

He said:

"Dave Davidson. Let him take the ball."

Q. (By Mr. Dinkelspiel): Now, Mr. Grady, did you make a memorandum of this conversation?

A. Yes, I did.

Q. And did you transcribe that or dictate it?

A. Yes. I dictated it to my secretary—that is, from——[446]

Q. By the way, did you at any time send that memorandum to Secretary Anderson?

A. Yes. Much later I presented it to him in his office with a covering letter.

Q. With a covering letter.

Mr. Wolkinson: May we have the date of it, if you please?

Mr. Dinkelspiel: Yes. The date of the telephone conversation was December 4. [447]

* * *

A. No, I went to Alburquerque to ask the Senator if he would give me a letter affirming the conversation that we had over the telephone while he was in Washington on December 4, 1947.

Secretary Anderson at that time had returned temporarily to private life.

And he told me that the request that I was making could not be made from Alburquerque because the notes would be in his secretary's, Mrs. Diamond's hands, in Washington, in the office there.

I then left Alburquerque, and when I arrived in

(Testimony of Dwight K. Grady.)

Washington I contacted Senator Anderson. I went to his office first. They told me he was on the floor of the Senate. And I went there, and he was good enough to come to the door and greet me, and said that, as I recall it, something to the effect that his notes were rather sketchy, but he would do the best that he could and I was invited to return to his office two or three days later; at which time I was shown a letter—in fact, the letter was given to me, quoting a letter I believe sent to Mr. Triggs of the Commodity Credit Corporation.

That letter was at great varience from my notes, my memorandum and my recollection of the conversation, and I therefore wrote a letter to Senator Anderson, who had advised [448] me that his notes were a bit sketchy, and I could understand why, of a telephone conversation at 7:30 in the evening after a long day in the Secretary's office, and I suggested that perhaps my notes, which were made at the same time, would refresh his memory and, if so, it might be possible for him to write a different kind of letter more accurately reflecting those notes.

Q. Now I show you, which purports to be typewritten notes of a copy of a telephone conversation, and ask you whether the notes were made on the date of the conversation?

A. Just for the sake of fact, this is not a copy of the notes. This is a memorandum reflecting notes.

Q. Prepared when?

A. At that time. I dictated it to my secretary as soon as I hung up, and I had the notes in my mind

(Testimony of Dwight K. Grady.)

—I mean, the notes before me and the conversation in my mind.

Q. So the notes were prepared contemporaneously with the telephone conversation and transcribed or dictated to your secretary the same day?

A. Yes, that's right.

Q. And the transcribed notes which I have shown you, will you state whether or not they reflect the substance of the telephone conversation as you knew it on December 4, 1947?

A. Yes, that's correct.

Mr. Dinkelspiel: I will offer these, if your Honor please. [449]

The Court: It may be marked.

The Clerk: Plaintiff's Exhibit No. 27 in evidence.

(Thereupon, memorandum of telephone conversation, Grady-Senator Anderson received in evidence and marked Plaintiff's Exhibit No. 27.)

Mr. Wolkinson: Counsel, if you don't mind, I hope you don't mind the interruption, I would appreciate it if you could conveniently—the question I asked was very simply when was this telephone conversation and the contents thereof first brought by letter to the Senator's attention for confirmation?

Mr. Dinkelspiel: Well, I will ask the witness to answer that question to the best of his recollection.

Q. (By Mr. Dinkelspiel): Mr. Grady?

A. It was, as I stated, presented to the Secre-

(Testimony of Dwight K. Grady.)

tary's Office—the Senator's office in Washington in February following his ascension to office of the United States Senator, and if my year was right, that was in 1949. It may have been later than that, it may have been 1950, but it was one of the two years.

Now, there is a letter of transmittal to Senator Anderson which will remove any doubt as to the date, and a copy of that memorandum was attached to it.

Q. I have here a letter you sent, copy of a letter you sent to Senator Anderson on September 21, 1948, which refers to Senator Anderson preparing a letter after going over the transcript of the telephone conversation. [450]

Would you say that refreshes your recollection as to the approximate date?

A. No. This letter was written after I had called on Senator Anderson in Alburquerque. He had resigned from the Secretaryship of Agriculture and was preparing to run for election to the office of U. S. Senator in New Mexico. Upon my return from that visit to Alburquerque I wrote this letter to him thanking him for his interview and then I told him that because he was so very busy at the time preparing to run for office that I thought it might be helpful if I wrote this letter to specifically outline my request for a statement affirming the conversation of December 4, during which he had suggested a course of procedure to be followed in connection with

(Testimony of Dwight K. Grady.)

September and October raisin contracts with Commodity Credit Corporation. [451]

* * *

Q. (By Mr. Dinkelspiel): Mr. Grady, you were last testifying, I believe, with respect to a memorandum of your conversation with Senator Anderson on December 4, 1947, in which, as I recall, you were informed that Mr. Dave Davidson would be in touch with you further?

A. Yes, I was instructed to get in touch with Mr. Davidson.

Q. I show you a copy of a telegram to Mr. Davidson dated December 4, 1947, and ask you whether you sent the original of this telegram?

A. Yes, this is the copy of the telegram that I sent to Mr. Davidson on December 4.

Q. That was sent after your conversation with Senator Anderson? A. That's right.

Q. Is there a penciled memorandum on that telegram in the upper left-hand corner? A. Yes.

Q. Written in your own handwriting?

A. That's right. The penciled writing says: Capital P, [453] which means pending January 5, to 12. Then the handwriting further says: This wire sent at suggestion of Clint Anderson during telephone conversation this date, EKG. My initials.

Q. Was that written on that telegram on that day?

A. Yes, at the time it was sent and I marked the letter to its pending date.

* * *

(Testimony of Dwight K. Grady.)

Mr. Dinkelspiel: This is dafed December 4, 1947, addressed to Dave Davidson, Acting Administrator, Production & Marketing Administration, United States Department of Agriculture, Washington, D. C.

"Many thanks your night letter December 2nd advising you regard contracts awarded this company and others pursuant to Announcements 1 and 2 to be in full force and effect. [454]

"We appreciate the consideration you have given this matter and we believe we understand your position. However, this is one of those rare times when we must respectfuly disagree with you. Based upon the representations of the Department that a purchase of 61,000 tons would be made and in reliance on those representations, we bid competitively to sell what we believed to be our appropriate share of the business at prices that would secure this business.

"With the full knowledge of the Department that the offer represented short sales on our part, the Department's later change in the program increasing the announced intention to purchase an additional 60,000 tons prevented us from purchasing raisins from producers to cover our sales and raises substantial legal question as to your rights to enforce earlier contracts. Fulfillment of contracts in question would result in grave financial losses to this company and under such circumstances we would undoubtedly be forced to stand on what we concede to be a sound legal position. Action on Department's part to enforce could then only result in lawsuits un-

(Testimony of Dwight K. Grady.)

profitable to all concerned including growers who were intended to benefit from the program.

"We, therefore, respectfully urge that in [455] view of the legal questions involved the sound and expeditious way to dispose of the problem is to enter into renegotiation looking toward equitable adjustment.

"Respectfully, Dwight K. Grady, Rosenberg Bros. & Co."

Q. I understood your testimony to be that the penciled memorandum: "This wire sent at suggestion Clint Anderson during telephone conversation this date, EKG," is a memorandum which you placed thereon on December 4, on this copy of the telegram on December 4, after the telephone conversation with Secretary Anderson pursuant to which this telegram was sent, that's correct?

A. That's right, Secretary Anderson instructed me to wire Davé Davidson.

Q. That's a contemporary memorandum made by you and placed upon that telegram?

A. That is correct.

Q. Did you have a reply from Mr. Davidson?

A. Yes, I received a reply about January 21, I believe.

Q. Prior to that time had you had a reply from him? A. I don't recall of having had one.

Q. I show you a telegram dated January 21, and ask you if that is a telegram which you received from Mr. Davé Davidson?

A. Yes, this is the telegram that I received. [456]

(Testimony of Dwight K. Grady.)

Mr. Dinkelspiel: I offer this telegram dated January 21, 1948, in evidence as plaintiff's exhibit next in order.

The Court: May be marked.

The Clerk: Plaintiff's Exhibit 29 in evidence.

(Whereupon, telegram above referred to was marked Plaintiff's Exhibit No. 29 and admitted into evidence.)

Mr. Dinkelspiel: This is a Government delivered paid telegram dated January 21, 1948, from Washington, D. C., addressed to Rosenberg Bros. & Co., attention Dwight K. Grady.

"The matter of performance under contracts awarded packers for CCC purchase of raisins under Announcements Nos. 1 and 2 discussed in correspondence and conversations with you has been given carful consideration by the Secretary and other representatives of the Department. It is concluded that you are under obligation to deliver pursuant to these contracts.

"Dave M. Davidson, Assistant Administrator for Production."

Q. Now, I find in your files, Mr. Grady, the files of your company, a letter dated the next day, January 22, 1948, addressed to Mr. R. M. Walker, Contracting Officer of the Commodity Credit Corporation, Fruit & Vegetable Branch, Post Office Box 773, Berkeley 1, California.

Was the original of that letter sent by Rosenberg Bros. [457] & Company?

A. Yes, this was the letter sent by Mr. Laflin,

(Testimony of Dwight K. Grady.)

in charge of the Shipping Department of Rosenberg Bros. & Company to Mr. Walker.

Mr. Dinkelspiel: I am keeping these in chronological order, your Honor, although sometimes the subject matter may vary. I offer this in evidence.

The Court: May be marked.

The Clerk: Plaintiff's Exhibit 30 in evidence.

(Whereupon letter referred to above was marked Plaintiff's Exhibit No. 30 and admitted into evidence.)

Q. (By Mr. Dinkelspiel): This is a letter dated January 22, 1948, with the initials A.H.L. at the top. A.H.L., is Mr. Laflin?

A. Yes, that is correct.

Mr. Dinkelspiel: Addressed to Mr. R. M. Walker, Contracting Officer, Commodity Credit Corporation, Fruit & Vegetable Branch, P. O. Box 773, Berkeley 1, California.

"Dear Sir:

"Please be referred to our Contract A6PM (ff)-1647 covering 6,000 tons domestic pack and 4,000 tons export pack Thompson Seedless raisins."

Q. (By Mr. Dinkelspiel): That is the first of the two contracts, is it not?

A. Yes, 1,647. [458]

Mr. Dinkelspiel: (Continuing.)

"Because of our inability to secure the raisins, due to the confused situation in the San Joaquin Valley resulting in an almost total stoppage of

(Testimony of Dwight K. Grady.)

movement of raisins into our Fresno plant, and because of our failure to secure any relief from Washington, we were unable to make delivery on shipments totally 5,718 tons domestic pack and 699,990 pounds export pack.

"We are now in a position to make deliveries against this contract, and it is our understanding that before the shipping and storage branch can instruct shipment against this contract, it will be necessary to issue an amendment reinstating this tonnage and extending the delivery date.

"We will appreciate it if you will furnish such an amendment.

"Yours very truly, Rosenberg Bros. & Co."

Q. (By Mr. Dinkelspiel): Now, at this time, Mr. Grady, about this same time, I note from your files a further correspondence with Senator Downey.

I hand you a copy of a letter dated January 23, 1948, to Honorable Sheridan Downey, Senate Office Building, Washington, D. C., and ask if you sent that?

A. Yes, sir, that is a copy of a letter I sent to Senator [459] Downey on the date that it bears.

Mr. Dinkelspiel: I offer this, if your Honor please.

The Court: It may be marked.

The Clerk: Plaintiff's Exhibit No. 31 in evidence.

(Whereupon letter above referred to was marked Plaintiff's Exhibit No. 31 and admitted into evidence.)

(Testimony of Dwight K. Grady.)

Mr. Dinkelspiel: I will read it, your Honor, if you want it.

The Court: Yes.

Mr. Dinkelspiel: Anything under three pages I will be willing to read.

"Honorable Sheridan Downey,
Senate Office Building,
Washington, D. C.

"My dear Senator Downey:

"I am puzzled, bemused, agitated, flabbergasted and generally mentally "kaput."

"About December 3rd, I telephoned you about our continuing Raisin worries because I had received a wire from Dave Davidson advising that the Administration considered our early Raisin contracts to be in full force and effect and also reported to you the conversation had with Secretary Anderson.

"On December 4th, I called the Secretary and he told me that he recognized the legal validity of our position and instructed me to send a wire to [460] Davidson setting it forth. In the course of this conversation the Secretary assured me that the legal validity of our position was recognized, and that he would secure a statement to that effect from the Solicitor's and would renegotiate our contracts to a base price of $125.00 to $130.00 a ton, which would not give us a profit but would cancel any loss we might otherwise suffer.

"I sent such a wire to Davidson on December 4th and on January 21st received a wire from Davidson

(Testimony of Dwight K. Grady.)

to the effect that after careful consideration by the Secretary and other representatives of the Department, it concluded that we are under obligation to deliver pursuant to these Raisin contracts.

"My first impulse was to again phone the Secretary and point out that this decision in effect repudiated the assurances he had given me on December 4th. However, upon thinking it over I thought perhaps it would be best to write this note to you for the purpose of ascertaining if you have any other ideas.

"I have checked our operations and since this program was announced find that our loss in fulfilling sales of 14,330 tons will be in excess of $315,000.00 as the result of our bidding competitively in good faith in our reliance on the Secretary's [461] announcement. This is a tough penalty for anyone to suffer, particularly when the initial mistakes were made by the Government.

"I know that a good many of the folks in the Department of Agriculture held the Industry responsible for much of the adverse publicity that attended the early development of the program. I know, beyond this, that the Secretary was upset at the political aspects of Joe Martin's intervention.

"I would not write this letter except that it seemed evident to me that you had impressed on Mr. Anderson the justice of our position and the unfairness that would result from an insistence of the fulfillment of the contracts because of the circumstances under which they were let; that the con-

(Testimony of Dwight K. Grady.)

structive course to follow would be to adjust prices.

"I hope that you will be able to offer me some constructive suggestions.

"Yours very sincerely, Rosenberg Bros. & Co., Dwight K. Grady."

Q. (By Mr. Dinkelspiel): That was sent to Senator Downey at that time, was it not?

A. Yes, that's correct.

Q. Then again adhering to the chronological sequence of [462] events I hand you a telegram—I know that counsel has seen this before.

Mr. Wolkinson: Yes, sir.

Q. (By Mr. Dinkelspiel): Addressed to Rosenberg Bros. & Co., 320 California Street, and signed Werner Allmendinger, Contracting Officer, and ask you if you received that telegram? That's a nightletter, is it not?

A. Yes, this is a nightletter dated January 26, at nine something p.m.

Q. Received by you?

A. On the morning of January 27.

Mr. Dinkelspiel: I offer the telegram in evidence, your Honor.

The Court: May be marked.

The Clerk: Plaintiff's Exhibit No. 32 in evidence.

The Court: So ordered.

(Whereupon telegram referred to above was marked Plaintiff's Exhibit No. 32 and admitted into evidence.)

(Testimony of Dwight K. Grady.)

Mr. Dinkelspiel: This is Government Nightletter paid, Berkeley, California, January 26, 1948, Rosenberg Bros. & Co., 320 California Street, San Francisco.

"Pursuant to contract No. A6PM(ff) 1647 you are obligated to deliver to Commodity Credit Corporation 12,000,000 pounds of raisins at a price of $.0755 per pound and 8,000,000 pounds at a price of $.0760 [463] per pound during the period beginning October 1, 1947, and ending December 15, 1947. The Shipping and Storage Branch, Production & Marketing Administration, sent you notice to deliver dated the 16th day of October, 1947, calling for delivery by October 29, 1947, of 699,990 pounds of raisins under said contract. You failed to deliver in accordance with that notice. Furthermore in response to inquiry by Shipping and Storage Branch regarding availability of additional lots under this contract you advised that such lots were not available for delivery. Notice of such inquiry and your response is contained in letters addressed to you by the Shipping and Storage Branch as follows: November 6, covering 1,002,000 pounds; November 10, covering 987,000 pounds; November 14, covering 846,000 pounds; November 19, covering 1,974,000 pounds; November 24, covering 2,116,500 pounds; November 28, covering 2,749,500 pounds; and December 3, covering 1,761,000 pounds. We should like to know whether you will deliver if you receive other notices to deliver, provided that no damages for non-delivery."

(Testimony of Dwight K. Grady.)

I would like to re-read those words:

"Provided that no damages for non-delivery will be [464] sought by Commodity Credit Corporation other than the waiver by you of all carrying charges on raisins covered by Contract A6PM(ff) 1647. Therefore, please advise us as to your intention with reference to delivering the quantities of raisins under the above-mentioned contract as well as under Contract A6PM(ff) 1893. We are willing to take delivery on all of the quantities covered by both the above-mentioned contracts at the contract prices.

"In accordance with recent advice received from Washington, D. C., these prices will not be raised except that the 12,000,000 pounds sold pursuant to contract No. A6PM(ff) 1647 in domestic containers shall be packed in export containers at an increase in price of $0.0005 per pound. We will not pay carrying charges on any raisins covered by contract No. A6PM(ff) 1647.

"This telegram is sent without prejudice to any rights of Commodity Credit Corporation. If this arrangement is agreeable to you please indicate your agreement therewith by advising us not later than 5:00 p.m. January 28, 1948. Otherwise please indicate your intention as to your performing on these contracts."

Q. (By Mr. Dinkelspiel): Upon receipt of that telegram on the 28th, what, if anything, did [465] you do?

A. On the 28th I called Mr. Allmendinger, told him that I was asserting a claim and had been—had

(Testimony of Dwight K. Grady.)

been in touch with the Secretary and others in Washington.

Q. Pardon me, my attention was called to the fact I erroneously said the 28th. I meant to say upon receipt of the telegram, the telegram was the 27th.

Will you proceed as to what you did?

A. I telephoned to Mr. Allmendinger, told him that we had asserted a claim or request for adjustment of the contracts, had been in contact with the Secretary of Agriculture and others in Washington, and I was unwilling to prejudice the position of the company with respect to that effort; that the document embraced in the telegram and its requirements could be more simply met without all of the legalistic aspects of that particular wire by simply extending the contracts, and following discussion along those lines in which Mr. Allmindinger advised that the assertion of a claim by the company was of no interest to him and meaning that it was not part of his responsibility. I agreed to send him a wire.

Q. Did Mr. Allmindinger tell you whether or not he had any authority to settle or negotiate the settlement of any claim?

A. No, he said that that matter didn't concern him, he was interested in knowing whether we would ship.

Q. And you sent him a wire on the 28th, is that correct? A. Yes, I did. [466]

Q. I show you a copy of a telegram dated Janu-

(Testimony of Dwight K. Grady.)

ary 28, and ask you if that is the telegram to which you refer?

A. Yes, this *is line* with the conversation that I had with him and was sent.

Mr. Dinkelspiel: Offer this next in order.

The Clerk: Plaintiff's Exhibit No. 33 in evidence.

(Whereupon telegram referred to above was marked Plaintiff's Exhibit No. 33 and admitted into evidence.)

Mr. Dinkelspiel: A telegram, your Honor, dated January 28, 1948, addressed to Werner Allmindinger, Production and Marketing Administration, Fruit & Vegetable Branch, Milvia and Austin Way, Berkeley, California:

"Re Tel January 26. This confirms our agreement to extend period for shipment as outlined your wire. Will appreciate receiving prompt shipping instructions.

"Rosenberg Bros. & Co."

Q. (By Mr. Dinkelspiel): What if anything transpired after that with respect to——

A. After receiving that wire, Mr. Allmindinger called me at my office, advised me that that was not the form in which he wanted the information; that this wire simply offering to extend the contract did not give the answers that he was seeking. And following a discussion of what he wanted, I wrote a second wire. [467]

Q. Did he tell you what what it was he wanted?

(Testimony of Dwight K. Grady:)

A. Yes, he said he wanted to know if we were going to ship.

Q. And did you send him a second wire?

A. Yes, I did, composed at the time we were talking on the telephone.

Q. You say composed at the time you were talking on the telephone? A. On the telephone.

Q. I show you a copy of your wire of January 28, and refer to the penciled writing on that.

A. Yes.

Q. On that document.

A. This was the composition that we arrived at on the telephone.

Q. By this, you mean the language which appears at the latter half of that copy of the telegram of January 28th?

A. Yes, this was embodied in a telegram sent the same day to Mr. Allmindinger and supplementing the earlier wire of the same day.

Q. So that is in your handwriting?

A. Yes, this is my handwriting.

Q. Was that written at or after the telephone conversation with Mr. Allmindinger, if you can recall?

A. My recollection is that it was written during the telephone conversation. We were trying to arrive at an understanding of [168] what he wanted for his purposes.

Mr. Dinkelspiel: I offer this in evidence next in order.

The Court: May be marked.

(Testimony of Dwight K. Grady.)

The Clerk: Plaintiff's Exhibit No. 34 in evidence.

(Whereupon telegram referred to above was marked Plaintiff's Exhibit No. 34 and admitted into evidence.)

Mr. Dinkelspiel: The first half of this, your Honor, is just another copy of the telegram which I have already read. I am now reading the penciled notation made by Mr. Grady:

"Supplementing our today's wire we are agreeable to conditions your wire for packing 12,000,000 pounds raisins in export containers at price increase of $0.0005 a pound. Also it is our intention to deliver raisins under contract A6PM(ff) 1893. R. B. & Co. D.K.G."

Q. (By Mr. Dinkelspiel): That was the language which you say was written during your conversation with Mr. Allmindinger and your construction of what he wanted you to say?

A. That's correct.

Q. And pursuant to that did you then send to Mr. Allmindinger a telegram which contains that language?

A. Yes, sir, on the—this is not——

Q. Maybe I gave you the wrong one.

A. Yes, this is the wire that I sent him and embodies the language that I had written in longhand on the other form. [469]

Mr. Dinkelspiel: I offer this in evidence, your Honor, please.

(Testimony of Dwight K. Grady.)

The Court: May be marked.

The Clerk: Plaintiff's Exhibit No. 35 in evidence.

(Whereupon telegram referred to above was marked Plaintiff's Exhibit No. 35 and admitted into evidence.)

Mr. Dinkelspiel: Exhibit 35 reads, your Honor:

"January 28, 1948. Werner Allmindinger, Production and Marketing Administration, Fruit & Vegetable Branch, Milvia at Austin Way, Berkeley, California.

"Supplementing our today's wire we are agreeable to conditions your wire for packing 12,000,000 pounds raisins in export containers at price increase of $0.0005 per pound. Also it is our intention to deliver raisins under Contract A6PM(ff) 1893."

Q. (By Mr. Dinkelspiel): That wire was sent to Mr. Allmindinger, correct?

A. That's correct.

Q. Now, did you hear from him further, and when?

A. I believe the following day I had another telephone call from Mr. Allmindinger telling me that he still didn't have the wire in the form that he wanted it, and asked me then to write a wire which he virtually dictated himself as to its [470] substance.

Q. I show you a wire that you sent which appears to have been sent on January 29, and ask you if this is the wire to which you refer?

(Testimony of Dwight K. Grady.)

A. Yes, that is the wire I refer to, and the wire that was sent to Mr. Allmindinger on January 29.

Mr. Dinkelspiel: I offer this, your Honor, please.

The Court: May be marked.

The Clerk: Plaintiff's Exhibit 36 in evidence.

(Whereupon telegram referred to above was marked Plaintiff's Exhibit No. 36 and admitted into evidence.)

Mr. Dinkelspiel: Plaintiff's Exhibit 36 reads, your Honor:

"January 29, 1948. Mr. Werner Allmindinger, Production and Marketing Administration, Fruit & Vegetable Branch, Milvia at Austin Way, Berkeley, California.

"Pursuant our wires 28 reference contract A6PM (ff) 1647 we confirm conversation. If delivery notice is issued against fruit covered by this contract we agree to ship such fruit and waive carrying charges as provided your wire January 26.

"Rosenberg Bros. & Co., D. K. Grady."

Q. (By Mr. Dinkelspiel): Now, what did you mean by pursuant to—yes, pursuant our wires 28 reference contract so and so, we confirm conversation. What did you confirm, what conversation do you refer to? [471]

A. Conversations to the effect that we were willing to ship and to waive carrying charges.

Q. In other words, you were doing three things, were you not? You were willing to ship; you were

(Testimony of Dwight K. Grady.)

waiving carrying charges; and you agreed to the adjustment in price for export shipment?

A. That's correct.

Mr. Wolkinson: I object to the question on the ground that this is definitely leading the witness and summarizing for him the witness' construction which is really Mr. Dinkelspiel's theory of why this isn't a waiver. Seriously objectionable, if the Court please.

The Court: Mr. Witness, does that represent your theory, or counsel's, or is it a fact or series of facts?

The Witness: Your Honor, it is a fact. That is what I was trying to do. I was trying to preserve my rights to assert a claim and to make shipment under advice of counsel at the time, and not present counsel, had given me that I would be within my rights to make such shipment without prejudicing those rights.

Q. (By Mr. Dinkelspiel): Did you on that occasion say to Mr. Allmindinger or on any occasion say to Mr. Allmindinger that you were waiving any rights that you might have under this contract to assert a claim against the Government?

A. Not in exactly those words. I said that I was unwilling to prejudice the position of my company with respect to the [472] claim that I was pressing.

Q. You said it in the negative instead of the other way. A. Well, perhaps.

Q. Mr. Grady, by sending those telegrams and

(Testimony of Dwight K. Grady.)

agreeing to ship, did you intend, in behalf of Rosenberg Bros. & Co., to waive any claim which you might have against the Government?

A. I did not.

Q. And did you at anytime in any of your negotiations, conversations, telephone or otherwise, communications or actions, intend to waive any claim which might have with Rosenberg—Rosenberg Bros. & Co., might have against the Government?

A. No, I did not. On the contrary, I intended to press the claim just as far as I could possibly press it because I felt the company had been very unjustly treated.

Q. Let us now proceed further in this investigation of whether your conduct indicated any waiver.

I will ask you to refer, in your memory, to your letter to Senator Downey, your bemused, flabbergasted and entirely "kaput," and did you receive any reply from the Senator on that subject?

A. Yes, a few days later I received a telegram from Senator Downey acknowledging the receipt of that letter and advising me he was investigating the matter.

Mr. Wolkinson: No objection.

Q. (By Mr. Dinkelspiel): This is the telegram to which you— [473]

A. Yes, this is the telegram that Sheridan Downey, Senator Downey, sent me.

Mr. Dinkelspiel: I offer this in evidence.

The Court: May be marked.

(Testimony of Dwight K. Grady.)

The Clerk: Plaintiff's Exhibit No. 37 in evidence.

(Whereupon telegram referred to above was marked Plaintiff's Exhibit No. 37 and admitted in evidence.) [474]

Mr. Dinkelspiel: This telegram is addressed to Dwight K. Grady, Rosenberg Bros. & Co., under date of January 30, 1948, dateline, Washington, D. C.

"Am making inquiries into situation discussed Urlet, January 23rd, and will report developments at earliest opportunity. Sheridan Downey."

Q. (By Mr. Dinkelspiel): Now you retained, I understand—withdraw the question.

Did you retain a copy of that telegram in your files? A. Yes, I did.

Q. And I show you a document which purports to be a copy of the telegram, on which there are certain pencil notations set forth?

A. Yes, sir.

Q. Will you read those pencil notations, please?

A. The notation here written in pencil, preceded by the number 2 3——

Q. Meaning——

A. February 3—and the pencil notation reads: "Sen. Downey phoned. Suggests my going to Washington to negotiate settlement."

Q. Does that indicate to you that there was a telephone conversation with Senator Downey of that date? A. Yes.

(Testimony of Dwight K. Grady.)

Q. Do you recall such a conversation? [475]

A. Yes, I do.

Q. And that Senator Downey suggested your coming to Washington? A. That's correct.

Q. And did you proceed to Washington, did you?

A. Yes, I did. A few days later.

Q. And did you meet with Senator Downey on this matter in Washington?

A. Yes. When I arrived in Washington I called on Senator Downey and had a conversation with respect to procedures.

Q. Now, Senator Downey has testified, and there has been introduced in evidence a letter to you by Senator Downey under date of September 30, 1948, referring to various conferences and consultations. (That is Exhibit 2 in this action).

Did you see any member of the Commodity Credit Corporation?

A. Senator Downey told me that he had attempted to—in fact, he telephoned in my presence to the Commodity Credit Corporation, and I don't know what gentleman he was speaking to there or what person, but he turned to me thereafter and told me that I should call on Mr. Cy Smith and that he would make an appointment for that purpose, and he proceeded to do so.

Q. Did you call on Mr. Smith?

A. Yes, I called on Mr. Smith.

Q. Who was present?

A. Mr. Smith, Mr. Graham, Mr. Abram Weinsfeldt from the [476] Solicitor's office of the Depart-

(Testimony of Dwight K. Grady.)

ment of Agriculture, and I don't recall if any others were present or not.

Q. And do you recall approximately the date of that visit? A. I believe it was the same day.

Q. That would be about——

A. February the 11th.

Q. February the 11th of 1948, right?

A. That's correct.

Q. Was anything said by either Mr. Graham or Mr. Smith, if so, by whom, as to what your course of conduct should next be?

A. Following some discussion of the case and the company's claim, Mr. Weinsfeldt, speaking as counsel, I presume, advised me that it would be necessary for me to file a claim and that every point in that claim should be emphatically stated, there should be no omissions or anything of the sort which might have it anything but a claim.

Q. And what did you after that?

A. I went and engaged counsel for the purpose of preparing such a claim.

Q. You engaged counsel? A. Yes, sir.

Q. That was Mr. Ehrlich, who sits at the table?

A. Melville Ehrlich.

Q. Melville Ehrlich who sits at the counsel table here? [477]

A. Yes, that's correct.

Q. Did you prepare what purported to be such a claim? A. Yes, we did. We spent——

Q. And what did you do with that?

A. We spent several days preparing the claim

(Testimony of Dwight K. Grady.)

and when it was finally completed—we were very reluctant to introduce it into the normal channels of the department, and therefore we went and called on Senator Downey, in his office, on——

Q. And—pardon me. A. Pardon me.

Q. Explain your reluctance to put it through ordinary channels. That might have a wrong inference.

A. Well, the company and I personally had been long engaged in business transactions with the Department. I had high personal regard for people in the Department. I was very reluctant to have a document of this sort floating around which cast reflections upon the Secretary of Agriculture. I wanted and preferred to arrive at this matter *my* negotiation and conciliation rather than by the legal processes of entering into litigation and so on, and having the thing in this form, because it expressed some very positive and strong language (however, not profane language or anything of that sort, but very emphatic language), and so I, before actually delivering it to Mr. Smith, as instructed, I went again to see Senator Downey to ask him to read over the claim and to make [478] any suggestions that he might have as to how it might be done.

Q. And in your presence did he read over the claim?

A. No, he was—it was a holiday. He said he would take it home and read it over and contact us in a day or two as to his opinion about it.

Q. And did he?

(Testimony of Dwight K. Grady.)

A. Yes, I believe on the 24th of February he got in touch with us and told us that he saw nothing to do but to file the claim.

Q. Did you thereafter file such a claim?

A. Yes.

Q. And with whom?

A. We went back and had the claim then drafted in formal fashion and delivered copies to Mr. F. S. Smith, to whom it was addressed.

Q. I show you a document of quite a number of pages, dated February 26, 1948, addressed to Mr. S. R. Smith, Production and Marketing Administration, U. S. Department of Agriculture, Washington D. C., and ask you if that is a copy of the document which was presented to Mr. Smith on or about the date it bears?

A. Yes, sir, this is a copy of the document delivered to Mr. Smith embodying Rosenberg & Co.'s claims.

Mr. Dinkelspiel: I offer this next in order in evidence.

The Court: It may be marked. [479]

The Clerk: Plaintiff's Exhibit No. 38 in evidence.

* * *

Q. (By Mr. Dinkelspiel): By the way, Mr. Grady, I might ask [480] you this general question. This claim was prepared by you, was it, and Mr. Ehrlich? A. Yes, we prepared it together.

(Testimony of Dwight K. Grady.)

Q. In Washington?

A. In Washington, D. C.

Q. On February 26, 1948?

A. That was when it was completed and submitted.

Q. Prepared in the course of the preceding week? A. Yes.

Q. And that is chronologically within a month after the telegram demanding delivery?

A. Yes, it was exactly, I would say, a month, from January 26 to February 26.

Q. And insofar as this statement is—this claim sets forth any facts——. Were these facts correctly stated, in your opinion?

A. Yes, in our opinion they were.

Q. Your recollection of what occurred, then fresh in your mind, was set forth in this claim?

A. Yes. And I had all of the documents——

Mr. Wolkinson: Now, if it pleases the Court, counsel himself said it would make a very interesting reading. He said it was self-serving. He said that it did not bear on the proof of the main issue, but on the question of waiver. He wanted to play a part. Now, I think he is doing exactly what [481] he said he wasn't going to do. I respectfully object, counsel. For the limited purpose you offered it, I have no objection at all.

The Court: I admitted it for the limited purpose.

Mr. Wolkinson: Thank you.

(Testimony of Dwight K. Grady.)

Q. (By Mr. Dinkelspiel): What occurred after that?

A. Well, it was received by Mr. Smith and sometime later requests were made for additional information.

Q. And was additional information submitted?

A. Yes. Mr. Ehrlich submitted additional information.

Q. Did you continue yourself in contact with members of the Commodity Credit Corporation and the Secretary's office?

A. Yes, I had. Whenever I was in Washington and had the opportunity to do so, I discussed the claim. In fact, I took other steps to secure an adjustment of the claim.

Q. There were some questions asked this morning by counsel for the Commodity Credit Corporation and some reference made to the memorandum of the telephone conversation with Mr. Anderson on December 4, and still adhering to the chronological order, I will show you a letter dated September 21, addressed (you were referring to this this morning) addressed to Senator Anderson—addressed to Mr. Anderson, your Honor—and you sent that letter?

A. Yes, I wrote this letter after I returned from Albuquerque, New Mexico where I called on Senator Anderson. [482]

Q. First let us have the occasion of your call on Senator Anderson in Albuquerque, New Mexico. When was that?

A. That was September 18, 1948.

(Testimony of Dwight K. Grady.)

Q. And what was the purpose of your call?

A. I went down to Albuirquerque to see if I could secure from Senator Anderson a statement incorporating the telephone conversation and its substance of December 4, 1947.

Q. And what was your conversation with Senator Anderson on that occasion?

A. Well, in the telephone conversation, making the appointment with Senator Anderson, he didn't know whether he could help me if I were asking for something from the records of his office in Washington.

I said I didn't believe that would be necessary, and went to Albuirquerque, where he gave me audience on the 18th.

Following some discussion of the matter, he said that it was unfortunate, but he would have to have his notes, which were in Washington, before he could write such a letter, and we arranged that when he would later be in Washington, I would contact him and ascertain the possibility of getting such a letter at that time.

Mr. Dinkelspiel: I now offer, if your Honor please, the letter as plaintiff's next in order.

The Court: It may be marked.

The Clerk: Plaintiff's Exhibit No. 39. [483]

(Thereupon letter dated September 21, 1948, Grady to Anderson, received in evidence and marked Plaintiff's Exhibit No. 39).

Mr. Dinkelspiel: Exhibit 39 reads:

(Testimony of Dwight K. Grady.)

"Mr. Clinton P. Anderson, care of Clinton P. Anderson Company, Alburquerque, New Mexico.

"My Dear Mr. Anderson:

"I am writing this letter for the dual purpose of thanking you for the interview you granted me on Saturday, September 18, and also as a reminder of our conversation.

"Because you are so very busy at this time, I thought it might be helpful if I wrote this letter to specifically outline my request for a statement affirming our telephone conversation of December 4, 1947, during which you outlined a suggested course of procedure to be followed in connection with our September and October raisin contracts with Commodity Credit Corporation. It was my understanding that you would prepare such a letter after going over the transcript of that telephone conversation.

"Thank you in anticipation of this letter, I beg to remain,

"Yours very sincerely, Rosenberg Bros. & Co. Dwight K. Grady." [484]

Q. (By Mr. Dinkelspiel): Now I notice in this file, Mr. Grady, a penciled memorandum—which I am showing to counsel——

Mr. Wolkinson: No, sir, I have no objection, if you want to show it to the witness.

Q. (By Mr. Dinkelspiel): Pencil memorandum, and I ask you whether that is in your handwriting, and when and where it was written, if it was in your handwriting?

A. Yes, this is my handwriting. It was written

(Testimony of Dwight K. Grady.)

at 2:30 p.m., November 9, 1948. It represents a phone, San Francisco to Clinton P. Anderson, Washington, D. C.

Q. And does it purport to set forth the contents of the telephone conversation?

A. It is a short—it is a note memorandum of Mr. Anderson's advices to me, in which he said:

"'saw Mrs. Diamond. Notes not complete of telephone record of December 4' but 'pretty good.' Is working on this. Has been asked by someone in Department to hold up until can talk to Anderson. Will write in few days.' Signed D.K.G."

Q. (By Mr. Dinkelspiel): Do you recollect having received that communication?

A. Yes, sir. I reduced it to a little more coherent language by dictation to my secretary.

Q. And you are referring to the transcription of it reading—— A. Yes. [485]

Q. As follows——

A. "After introduction, Mr. Anderson said, in part"——

This is headed "Memorandum telephone call D.K.G. to Clinton P. Anderson, Washington, D. C."

"After introduction, Mr. Anderson said, in part, 'I saw Mrs. Diamond, who found that her notes have a record of our telephone conversation of December 4 are not complete, but are pretty good, and I am working on them. I had been asked by someone in the Department to hold up my letter to you until they can talk with me. I expect to write you in a few days.'" [486]

* * *

(Testimony of Dwight K. Grady.)

Q. (By Mr. Dinkelspiel): I will show you now, Mr. Grady, a letter addressed to you on the stationery of the United States Senate by Senator Anderson, ask you if you received that letter?

A. Yes, sir, I did, it was handed me in the office of Senator Anderson in Washington.

Q. And you had called upon him at or about that time? A. Yes, I had.

Mr. Dinkelspiel: I offer this in evidence, your Honor, as plaintiff's exhibit next in order. This is a letter, your Honor——

The Clerk: Plaintiff's Exhibit No. 40 in evidence.

(Whereupon letter referred to above was marked Plaintiff's Exhibit No. 40 and admitted into evidence.)

Mr. Dinkelspiel: Dated February 2, 1949, addressed to Dwight K. Grady, Rosenberg Bros. & Company, San Francisco 6, California.

"Dear Mr Grady:

"Pursuant to your request for a statement confirming our telephone conversation of December 1, 1947, with respect to certain Raisin contracts [187] between your company and the Commodity Credit Corporation, I have reviewed my notes of the conversation. Based upon these notes and my recollection, I find the conversation was substantially as follows:"

And then there is indented the following:

(Testimony of Dwight K. Grady.)

"I informed you that the Commodity Credit Corporation could not take any other position than that the contracts were binding and that the successful bidders were obligated to deliver thereunder. I further informed you that there might be a chance for renegotiation of the price and I would request our legal staff and officials of the corporation to see if they could find a basis for renegotiation, but I did not promise that there would be a renegotiation or that an adjustment would be made. You suggested that you would be willing to make deliveries as called for under the contract with the understanding that such deliveries would be without prejudice and the matter would be renegotiated. I rejected this suggestion and took the position that we did not want deliveries conditioned upon any understanding."

That is the end of the telephone conversation notes.

"I am sending a copy of this letter to Mr. Trigg, President of the Commodity Credit [488] Corporation."

Q. (By Mr. Dinkelspiel): After receipt of that letter did you or did you not reply to Senator Anderson?

A. Yes, I did reply to Senator Anderson.

Q. And this is a letter dated February 2, 1949. I will ask you whether the original of this letter was sent by you to Senator Anderson, letter dated February 3, 1949?

(Testimony of Dwight K. Grady.)

A. Yes, sir, this is a copy of the letter I wrote to Senator Anderson.

Q. And attached thereto, as there is attached to that copy was a memorandum of your transcribed telephone conversation of December 4, 1947?

A. It was a memorandum reflecting the notes that I made during that telephone conversation.

Q. That is the same memorandum, a copy of the same memorandum which is in evidence as Plaintiff's Exhibit No. 27, that is the same memorandum?

A. Yes.

Q. As Plaintiff's Exhibit 27?

A. That's correct.

Mr. Dinkelspiel: I now offer this letter, your Honor, with the accompanying memorandum attached.

The Court: May be marked.

The Clerk: Plaintiff's Exhibit No. 41 in evidence.

(Whereupon letter referred to above was marked Plaintiff's Exhibit No. 41 and admitted into evidence.) [489]

Mr. Dinkelspiel: Now, this letter is dated Washington, D. C., February 3, 1949:

"Honorable Clinton P. Anderson, United States Senate, 344 Senate Office Building, Washington, D. C.

"My dear Senator Anderson:

"Thank you very much for your letter of February 2, 1949, in which you paraphrase the substance

(Testimony of Dwight K. Grady.)

of a telephone conversation of December 4, 1947, based upon partial notes of that conversation.

"Because of the extreme importance of this matter to me and to my company, I am taking advantage of your kind suggestion that I suggest changes in the event your letter proved not entirely satisfactory.

"I want to respectfully point out that your letter as it is now written, containing as it does only part of our conversation of December 4, 1947, would, in all probability, be harmful to our position in the unfortunate transactions with which the telephone conversation dealt. In fact, all of the events and conversations following a lengthy conference you were good enough to afford me in your office about November 20, 1947, encouraged me to believe that our case was under sympathetic review. The sequence of events thereafter encouraged me to [490] telephone to you in Albuquerque in September and to visit your office in that city on September 18, 1948, for the purpose of discussing our telephone conversation of December 4, 1947, and to secure, if possible confirmation of the substance of that telephone call.

"From my own notes, I am paraphrasing the conversation and its import, which, of course, goes considerably beyond the paraphrasing of the same call in yours of February 2.

"If these notes serve to supplement your own notes and recollections of the conversation, and if your letter to me can be rephrased in accordance

(Testimony of Dwight K. Grady.)

with its substance, I shall be extremely appreciative."

Q. (By Mr. Dinkelspiel): And attached to it, to the letter, is this memorandum of the telephone conversation as recalled by Mr. Grady and which is also in evidence as Exhibit No. 27 for plaintiff.

And after that was there any further conversations with Senator Anderson on this matter?

A. Yes, I had telephone conversations with him, and later saw a letter that was being written to Mr. Abrahm Weinfeld in the Solicitor's Office in the Department of Agriculture making changes from the letter that he had sent me on the—or handed me on the 2nd of February. [491]

Q. You saw such a letter in Senator Anderson's office?

A. I was permitted to read it with the advice, however, that I could not have a copy of that letter.

Q. You did, however, makes notes of its contents?

A. Immediately after reading it I went back to my counsel's office and dictated from memory what I had read.

Mr. Dinkelspiel: Assuming that the original letter will be produced, your Honor, I think that would be the best evidence.

Q. (By Mr. Dinkelspiel): And you continued did you continue thereafter on behalf of your company, to press your claim with the Commodity Credit Corporation? A. Yes, I did.

(Testimony of Dwight K. Grady.)

Q. Is it true that a brief of law was filed by your counsel?

A. Yes, briefs were prepared, as I recall it, for the Contract Disputes Board at a later time.

Q. And it is also true—I will ask you whether it is true you filed in February of 1949 with Mr. S. R. Smith, Director of the Fruit and Vegetable Branch a supplement to your claim?

A. Yes, that was filed by counsel on our behalf.

Q. And then after rejection of your claim by the Fruit and Vegetable Branch of the Commodity Credit Corporation the matter was taken to the Contract Disputes Board?

A. Yes, I discussed it with Secretary Charles Brannon prior to its going to the Contract Disputes Board. [492]

Q. And at his suggestion, was it that you follow all the remedies afforded you, is that correct?

A. Yes, that was his suggestion.

Q. And the Contract Disputes Board is not an independent agency, is it?

A. No, it is an agency of Commodity Credit Corporation.

Q. Of Commodity Credit Corporation itself. And this was done, was it not, during the period in which Mr. Arthur Oppenheimer, whom counsel has praised so highly in his opening statement, was living?

A. Yes, Mr. Oppenheimer continued to live until sometime in March, 1950. I believe it was early in March, 1950?

(Testimony of Dwight K. Grady.)

Q. And in the meantime there was this continued effort to have recovery of your claim?

A. Yes, that's correct.

Q. By the way, although I believe the pleadings so establish it, I will ask the question: Deliveries were made under the contract subsequent to the exchange of telegrams in the latter part of January?

A. Yes, deliveries were made, as I recall, during the months of February and March.

Q. Yes. And it is for the loss suffered or allegedly suffered in the acquisition of raisins delivered that this action is brought?

A. Yes; that's correct. [493]

* * *

Cross-Examination

By Mr. Wolkinson:

* * *

Q. On or about October 14 when the Secretary changed his announcement, did you consult an attorney respecting your rights under the two contracts in suit?

A. Shortly after October 14, I did.

Q. Within a day or two or three?

A. On that weekend, yes.

Q. On that weekend. And you received legal advice as to what you should do?

A. No. I received the impression, I believe, legal opinion as to what my rights were under the situation that existed. [494]

(Testimony of Dwight K. Grady.)

Q. You were advised that you were to mitigate damages?

A. No, I wasn't advised that I was to mitigate damages.

Q. What were you advised to do with respect to delivery under these contracts?

A. I told counsel that—of what I had done, and he assured me the course of action I had followed was one he would have advised me to take had I asked him before taking the action. In the discussion he said it certainly is incumbent upon the buyer under such circumstances to mitigate losses confronting the seller. He also said——

Q. The buyer or the seller?

A. It was up to the buyer, the Commodity Credit Corporation, to mitigate any loss that might confront us because of its actions.

He also said that I was within my rights to either ship or not to ship, that would not in any way impair my rights to recovery of damages.

Q. And did you abide by that advice?

A. My course of conduct followed that line, yes.

Q. And did you issue instructions to Mr. Latl who was in charge of the Shipping Department, that he was not to pay any attention to the shipping notices and that he was not to deliver the merchandise?

A. I didn't tell him he was not to pay any attention to the shipping notices. I told him he was not to ship. [195]

(Testimony of Dwight K. Grady.)

Q. What did you tell him to tell us as the reason for not shipping?

A. I told him in the first instance to tell them we didn't have the raisins.

Q. And did he under your supervision write a letter, which is in evidence, in October, advising us that there was a complete stoppage of movement of raisins into the Fresno plant?

A. No, he didn't write that letter under my supervision. He wrote the letter pursuant to his instructions to advise the Shipping and Storage Branch that we didn't have the raisins and therefore couldn't ship.

Q. Who gave him those instructions?

A. I did.

Q. Did you continue to give him similar instructions with respect to eight or nine other notices that we sent in October, November and December?

A. Whenever he asked any questions about it, I told him not to ship, tell them anything you want, but tell them we are not going to ship.

Q. Do you recall in your deposition on August 13, you said in substance——

Mr. Dinkelspiel: Well, please, not in substance. If you are going to quote from the deposition you'd better show it to the witness.

Mr. Wolkinson: Just let me finish. Not in substance, I [496] quote:

"I told him, tell them that we haven't got the raisins."

A. Yes, that's right.

(Testimony of Dwight K. Grady.)

Q. You said that to Mr. Latlin? A. Yes.

Q. That's what you told him to tell us in response to each of the eight notices which we sent?

A. May I see the deposition?

Mr. Dinkelspiel: Yes, I was going to say you answered it rather fast, Mr. Grady, give me a chance to suggest to counsel that he get the deposition and then let the witness read it.

Mr. Wolkinson: You find it for me while I turn to another subject for a moment—that is, the same subject but to specific notices.

Q. (By Mr. Wolkinson): I ask you kindly to look at a notice, at a letter which is in evidence—to refresh your recollection, October 21, 1947——

Do you know the exhibit number of the letter sent by Rosenberg, October 21, 1947? You have them arranged in order.

Q. (By Mr. Wolkinson): Plaintiff's Exhibit 20 I am showing you, the original, I believe, of that. That says:

"This will confirm our telephone advice of this morning to the effect that we will be unable to make deliveries of raisins against [497] contract"—that is the first contract——

"A6PM(ff) 1647 as instructed in your notice to deliver FKMA 50568-C dated 10 46 47.

"Our inability to make deliveries is due to the confused situation in the San Joaquin Valley resulting in an almost total stoppage of movement in raisins into our Fresno plant."

That is the one you are looking at.

(Testimony of Dwight K. Grady.)

Mr. Dinkelspiel: That is October 16?

Mr. Wolkinson: October 21, 1947.

Q. (By Mr. Wolkinson): That was, I take it, the first advice which you instructed Laflin to send us?

A. I wouldn't say that I instructed Mr. Laflin to send that letter. I told Mr. Laflin that we were not going to ship raisins against those contracts. At the time that letter was written he undoubtedly was describing the facts. Whether at that time he had specific instructions from me to tell Mr. Pingatore that we didn't have raisins, I don't know. Such instructions would hardly have been necessary in view of the facts as far as the company was concerned, possession of raisins.

Q. Now, in the meantime while you were looking at this exhibit I have received your deposition of August 13, and I show you—well, I will read—I will be glad to show it to you if you wish. At page 61 I asked you—— [498]

Mr. Dinkelspiel: Wait a second, counsel. What page, please?

Mr. Wolkinson: 61.

Mr. Dinkelspiel: What line?

Mr. Wolkinson: There are no lines oh, yes, there are. Excuse me. Line 12.

"Did you, around the 6th of November, receive a communication from Secretary Anderson or Mr. Dodo"——

this is Dodo, but it is Dodds, D-o-d-d-s——

"acting for him as Acting Secretary, stating

(Testimony of Dwight K. Grady.)

in substance that your contracts would not be cancelled?"

And you answered:

"That's right."

We have that telegram.

The Witness: What date was that?

Q. (By Mr. Wolkinson): I said around November 6.

A. I thought you said October 6.

Q. I am sorry. That is in evidence, I think it was November 4.

The next question:

"And what did you do with respect to your instructions to Laflin?

"Answer: Told him not to ship."

A. That is correct. [499]

Q. That is correct. And then:

"At the time you gave him instructions, you had not yet acquired raisins to fulfill these contracts?"

And you answered:

"That's right."

Then I said.

"And you didn't acquire the raisins because of legal advice that had been given to you by your lawyers to the effect that damages were to be minimized?"

And you answered:

"No, I wouldn't say that was the reason I gave instructions not to ship."

Was that right?

(Testimony of Dwight K. Grady.)

A. I think that is correct, yes.

Q. Then I ask 1:

"Give us your reason.

"Answer: I gave instructions not to ship because I didn't want to convert a foreseen loss into an actual loss until there was an opportunity to work the thing out. I didn't consider a communication from Washington refusing to cancel the contract or to adjust it as being final."

Is that true? [500]

A. Yes, but not at the same time. Your line of questioning is to ask me if I did these things in October, or early November. Our decision not to ship was made when we were accumulating raisins. When we were accumulating raisins we were not going to ship, and thereby start entering in the cash register, if you please, these losses. [500-A]

Q. (By Mr. Wolkinson): Let me show you the notices of which I spoke before and ask you whether this refreshes your recollection. Here's one of November 10th which we sent, signed by vendor, signed Laflin, signed November 10th. Kindly look at it and read it.

A. You want me to read it aloud?

Q. No, to yourself, please. If you would, please. I am going to ask you when you have finished reading whether these notices which were sent you, which we sent you, "notice to ship," and these responses, came to your attention at that time?

A. No.

Q. October, November and December of 1947?

(Testimony of Dwight K. Grady.)

A. Mr. Wolkinson, these are routine instructions issued by the Shipping and Storage Branch to the company. They were handled as a routine matter by Mr. Laflin, who is head of the Shipping Department, operating in a clerical capacity. His instructions were given to him generally and he carried out those instructions. He was a man of long years of experience in the industry, in the company and did not come to his superiors with details of this kind. If he were given instructions not to ship, he went ahead and didn't ship, and he received these documents in routine manner and dealt with them by replying in a routine manner. Those were not called to my personal attention as each one came in. [501]

Q. Now I am looking at notices November 10, November 14, November 19, November 21, November 28, December 3, all issuing—these are copies marked on their face "mimeograph" but with typewritten matter in, from the U. S. Department of Agriculture, addressed to Rosenberg Bros. & Co. Attention Mr. Latlan, and if you read the first paragraph, it reads:

"This is to confirm the telephone conversation between Mr. Martin Latlan of this office and your Mr. Latlan on November 6, 1947, wherein Mr. Latlan stated that 987,000 units of the commodity in [illegible] contract F1647 are not available for delivery as requested and will not be available for delivery on or before September 24, 1947."

I was referring to a notice of that character in

(Testimony of Dwight K. Grady.)

your deposition when I asked you whether you had given instructions and when you made the answer, "Yes, I gave instructions."

Now, does that in general——

A. I gave instructions that we would not ship when the question was first presented by the shipping department. I had requested cancellation on the 14th. Thereafter the matter became routine, unless those instructions to Mr. Laflan were changed.

Mr. Dinkelspiel: Counsel, for the purpose of the record, will you let his Honor see how—the form of this document, that it is a mimeograph document, full of blanks—— [502]

Mr. Wolkinson: We will come to that.

Mr. Dinkelspiel: With the blanks typed in showing that naturally you anticipated and were prepared for these delays. You yourself prepared the forms.

Mr. Wolkinson: Counsel, let me do it in my own way.

Mr. Dinkelspiel: I suggest that his Honor see the document before you go any further with your examination.

Our main reason for asking your Honor to see this document and this series of documents is that you will see that they are mimeographed, the names are filled in, and the amounts are filled in, and the dates are filled in. It is obviously anticipating refusal. [503]

* * *

(Testimony of Dwight K. Grady.)

Mr. Wolkinson: I don't want to mislead him. Let Mr. Grady tell us what is the purport of that letter as he understands it with respect to the availability or unavailability of the raisins for delivery under these contracts as of that date.

A. As of January 22?

Q. And a few days preceding that date, yes.

A. As of January 22, he says,

"We are now in a position to make deliveries against this contract. As to the conditions which existed, that a confused situation in the San Joaquin Valley resulting in an almost total stoppage of movement of raisins into our Fresno [506] Plant——"

That was true. There was an almost total stoppage of movement of raisins. There was a confused situation. The company was for many weeks unable to procure raisins."

Q. When——

A. But he says, "we are now in a position as of January 22 to make deliveries."

Q. Would you say that as of that date or a few days preceding, those conditions, which had been serious and prevented delivery, changed so as to make that letter possible?

A. Yes. I would say that progressively the condition——

The Court: You would say what?

The Witness: I would say that progressively from October on the company was procuring additional quantities of raisins in substantial quantities

(Testimony of Dwight K. Grady.)

For example, during the months of November and December very large tonnages of raisins were acquired, and those built up the stocks from which 14,330 tons of raisins could be packed and shipped.

Q. (By Mr. Wolkinson): Would you say that 5,000 tons of raisins could have been shipped in fulfillment of the notices sent to your company in the months of October, November and December of 1947?

A. I would say that 5,000 tons or even 1,000 tons could not have been shipped in October. [507]

Q. In November?

A. In November, yes. I suspect by the end of November, 5,000 tons of raisins could have been shipped.

Q. Could have been shipped in December?

A. Yes.

Q. In other words, do you now say——

A. We are talking about 5,000 tons, are we not?

Q. Yes. Do you say that in the month of November, taking your domestic commitments, commercial trade, export trade, and the Government commitments of 14,000 tons, would you say that in the light of all these commitments that 5,000 tons approximately to the Government could well have been shipped in November?

A. No, I would not say that 5,000 tons could have been shipped in November under those circumstances. I would say that some tonnage could have been shipped. [508]

* * *

(Testimony of Dwight K. Grady.)

A. The contract date is the date of purchase. It does not mean, however, completion of delivery or actual physical possession of the fruit, which may come at some later time and then be paid for. When you have a contract for purchase, then you have actual deliveries that wait against that and may be more or less than the quantities called for in the purchase contract. [510]

* * *

Mr. Wolkinson: So the Senator could hear while you are testifying and so I shouldn't have to read him the transcript of it, I notice that Mr. Dinkelspiel left out altogether, and I don't say it was with any ill motive, of course, the substance or the details of a two-hour conversation which you had with the Senator in his office, I think in the month of November, 1947. I wonder if you could please tell us, if not all the details, at least as a businessman, how you would summarize for us what happened, what did you say——

Mr. Dinkelspiel: I told you before——

Q. (Mr. Wolkinson): What did you say to the Senator and [514] what did he say to you?

Mr. Dinkelspiel: I told you before Court, Mr. Wolkinson, that Mr. Grady told me and my associates of a two-hour conversation which was plenty frank between the Senator and Mr. Grady, and I was not going to question him on it because I didn't think it was a matter of decency when two gentlemen get together and have a rather heated and fair

(Testimony of Dwight K. Grady.)

discussion on very many, many points. I did ask him what the substance was as it related to the case, this case. I am delighted if Mr. Grady will tell exactly what happened. I thought there was a certain amount, oh, I don't know how to say, decency—maybe it's the wrong word. I thought it bad taste to talk of some of the things that were said at that conference and hash them over and re-hash them. Counsel asked him. I am delighted. Only we won't be through at four o'clock with a two-hour conversation.

The Court: Now, if you can capsule to a two-hour conversation in three minutes——

Mr. Dinkelspiel: I shouldn't have interrupted you.

The Court: Go ahead.

Q. (By Mr. Wolkinson): Just tell us——

The Court: Will you state in summary, Mr. Grady, the extent of the conversation, the implications and the overtones and the undertones, so the Senator may have a summary?

A. Well, I can give you certainly the things that were [515] highlighted in my mind.

The Court: The salient features.

The Witness: This was a man-to-man conversation, so characterized by the Secretary, who said that he understood that I was the kind of a man who could speak with great frankness but without losing my temper, and that we could remain gentlemen while we discussed it, and I said, "That's fair enough, Mr. Secretary, let's go on that basis," and I

(Testimony of Dwight K. Grady.)

proceeded to criticize the program in its various aspects by saying what it was doing to us. And the Secretary gave me some of his background of how the program had so developed.

The thinks that stuck out in my mind the most were questions that I asked him as to the truth of newspaper articles that had—statements that had been attributed to him as a result of interviews. The first of these quoted the Secretary as saying that he believes that the packers had ganged up on him.

And I expressed great surprise at his acknowledgement that he had made such a statement, because, and I pointed this out to him, Sun-Maid Raisin Growers was one of the low bidders in the first invitation, and Sun-Maid Growers was an organization of growers, and it was hard for me or for anyone, I should think, to rationalize that kind of an action by a cooperative marketing association.

The Secretary's response to the effect that he was greatly [516] disappointed in Sun-Maid and himself couldn't understand how such a sale would be made by Sun-Maid.

And my reply was that Sun-Maid is also a packer, they are in business, they can't afford to let business pass without participating in it, and that they consequently did and their bid was only about 12 cents a ton above our bid, which was the low bid.

The next quotation that I asked him about, that was attributed to him, was a statement that he had declared he intended to teach the packers a [517] lesson.

(Testimony of Dwight K. Grady.)

And he affirmed that that was true because——

The Court: Pardon me. To teach the processors a lesson?

A. To teach the packers a lesson.

And I asked him what the meaning of that was.

And the meaning of that was that you can't buck a four billion dollar corporation.

In the course of the further discussion he said,

"And beyond all that, when Joe Martin got out to Fresno to make his speech you fellows gave him a speech which he had to go into his prepared talk, and it was the Secretary had bungled and would have to go back and start all over again."

And I denied that we had had anything to do with that, that it was probably given to Joe Martin by Bud Gerhardt, local representative, Congressman in the District, that we had nothing to do with it, and he said:

"Well, I didn't have to do what Joe Martin said. I didn't have to go back and start all over again. I could continue to buy more raisins, and that's what I did."

And from then on we went into perhaps a little more rational discussion of the program.

We were interrupted on a number of occasions by the Secretary's secretary, and he informed her that he didn't want to talk to anybody else, that he was up to here (witness [518] indicating head) in raisins and he wanted to see it through.

The conversation was finally terminated at 1

(Testimony of Dwight K. Grady.)

o'clock by a call, I believe from the White House to the Secretary, that the Secretary had to attend other business, that of the President. And at that time he said:

"Well now, we have gotten this far and I have to go." He said, "I suggest that you go down and see the members of the Board of Commodity Credit Corporation." And I said,

"Well, if you instruct your Secretary to so arrange, I will be very happy to do that."

And from there on I went down. Now——

Mr. Dinkelspiel: Was there any reference to a four billion dollar corporation?

A. Yes. That was in response to the question that I had asked him, if he was going to teach the packers a lesson, that you can't buck a four billion dollar corporation.

Q. (By Mr. Wolkinson): Mr. Grady, did you make any memorandum of that conversation?

A. No, sir. I was so impressed by two things, Mr. Wolkinson, that I didn't have to make any. This was a very dramatic episode in my life. I was in the presence of a Cabinet Officer of the United States Government. He was dealing with me on a man-to-man basis with the utmost frankness and his remarks were indeliby impressed in my [519] mind.

* * *

Q. Do you recall having brought to the attention, by memorandum, to Mr. Oppenheimer, in the month of September, 1947, the fact that what Ag-

(Testimony of Dwight K. Grady.)

riculture would do in any of its programs or in a particular program was a gamble, a memorandum which you wrote? A. In September, '47?

Q. Yes. Early September.

A. I could very well have said that.

Q. And you passed on at that time the opinion of a gentleman named Corbaley that what Agriculture would do in the development of a program was a gamble, using those words?

A. Well, now, I think that I am entitled to know the time and date of any such memorandum.

Mr. Dinkelspiel: Well, you are entitled to see the memorandum. I had the idea that counsel wanted to shorten this examination, in view of your Honor's suggestion that [523] we take the adjournment. But if you want to keep——

Q. (By Mr. Wolkinson): I am showing you a memorandum before October 30, 1947, to Mr. Oppenheimer.

Mr. Dinkelspiel: May I see this memorandum, counsel? This practice of yours of showing it to the witness without showing it to counsel——

Mr. Wolkinson: You have it in your files.

Mr. Dinkelspiel: I haven't seen it. Maybe it is in our files.

Mr. Wolkinson: You gave me a copy.

Mr. Dinkelspiel: When you take something out of a lot of papers, I don't know what you take unless you show it to me. You know, I can't read always your mind.

A. This is a memorandum dated September 30

(Testimony of Dwight K. Grady.)

addressed to ACO, who was Mr. Oppenheimer, from DKG, that is myself, and it says:

"For what it is worth Cobarley says 'Agriculture seems determined not to buy dried fruit appreciably above levels established in first acceptance of bids, but what Washington may do is always a gamble.'"

Q. (By Mr. Wolkinson): Did you believe the words, that you wrote as passed on to you by Mr. Cobarley, did you believe that his guess or his opinion of the situation was a true one?

A. I prefaced the quotation by says "For what it is worth, [524] Corbaley says."

Q. Did you think it sufficiently worth while to engage your time in dictating and writing and passing to Mr. Oppenheimer this memorandum?

Mr. Dinkelspiel: He did it. Doesn't that answer it?

A. I had a purpose.

Q. (By Mr. Wolkinson): What was your purpose in sending it?

A. In all probability it was to further stimulate Mr. Oppenheimer's feelings. He was pretty well disgusted with this program, and so I said, "Well, here it goes again. Here it is, for what it is worth, this is what Corbaley thinks of it."

Mr. Wolkinson: I have one more question, if the Court will allow, and I will stop.

The Court: Yes.

While counsel is examining the transcript, Mr. Grady, there is one question I should like to present to you, while the Senator is here. During the course

(Testimony of Dwight K. Grady.)

of one of your conversations and I cannot presently recall the precise date, as reflected in one of your memoranda, reference was made to the assertion on the part of the Senator that you would renegotiate or at least it was hoped that you would renegotiate, and that an opinion of the Solicitor might be forthcoming to fortify that position. A. Yes.

The Court: Do you recall whether the Senator indicated [525] to you at any time that he had an opinion from the Solicitor?

A. No. His indication to me—that was the conversation of December 4th?

Q. Yes, I think so.

A. He expressed the understanding that I had legally valid points in our favor, and that he would get the Solicitor to make a finding to that effect, and then it could be worked out, a formula, that would save us from loss but would give us no profit.

The Court: I understand that. And at no time thereafter was any mention made of an opinion forthcoming from the Solicitor?

A. As I recall it, Senator Downey in his testimony said that the Secretary had been advised by the Solicitor or caused him to change his opinion, and that it now would have to be an appeal, claim for appeal would have to be initiated by us. That was in Senator Downey's testimony and in the letter which is in evidence. [526]

Q. (By Mr. Wolkinson): Do you recall my asking you in the deposition on the 13th of August this question:

(Testimony of Dwight K. Grady.)

"Now, as an experienced"——

Mr. Dinkelspiel: Page, please.

Mr. Wolkinson: I beg your pardon?

Mr. Dinkelspiel: Page.

Mr. Wolkinson: 43.

"Question: Now, as an experienced official of Rosenberg Bros. & Co., charged with responsibilities in connection with Government contracts, had you been in the habit in the past of making commitments of a contractual nature for your company, financial commitments, in reliance upon press releases?"

And do you remember making this answer:

Mr. Dinkelspiel: Excuse me, counsel. If you will read the next line you will see that an objection was made——

Mr. Wolkinson: Well, do you make an objection?

Mr. Dinkelspiel: I stand on the objection, yes. It is assuming facts not in evidence. It is an improper question, asking the witness to assume what he would do.

The Court: The objection is overruled.

Q. (By Mr. Wolkinson): And do you remember making this answer:

"Well, the answer to the question is no. The press release is a device used by the fruit and [527] Vegetable Branch to announce programs. The press release is sent to newspapers and it is sent to people in the industry, potential vendors and others having an interest."

(Testimony of Dwight K. Grady.)

Mr. Dinkelspiel: Pardon me, counsel, would you mind reading from the corrected copy of the deposition?

Mr. Wolkinson: Well, my copy, unfortunately, was never corrected, but I'll read your copy.

Mr. Dinkelspiel: It isn't our copy, it is the original sworn one that I am giving you now.

Mr. Wolkinson: Parenthetically, your Honor, this dramatic play which I am sure isn't meant, these were taken so late and transcribed August 13, and by the time the stenographer gave them to us, the trial had commenced, and my copy hasn't been conformed.

Mr. Dinkelspiel: Oh, I just asked you to read from the corrected copy.

Mr. Wolkinson: The answer to the question is "no," and Mr. Dinkelspiel's corrected copy just given me——

Mr. Dinkelspiel: The court's corrected copy; it isn't our copy.

Mr. Wolkinson (Reading):

"The press release is device used by the Fruit and Vegetable Branch to announce programs. The press release is sent to newspapers and it is sent to [528] people in the industry, potential vendors and others having an interest. We received that by mail from the Department as the press release itself is following"——

written originally and now it is crossed out——

"* * * as the press release itself is followed by a formal invitation to bid in an offer to sell form"——

(Testimony of Dwight K. Grady.)

"——in an offer to sell form."

F-o-r-m.

"And when that form reaches us and after we are satisfied with its terms and conditions and decide that we will make an offer to the Government, we are guided by the form, which is a proposed contract, and if accepted by the Government is executed by the Government"—originally it was transcribed company, "company" was stricken out, "Government" written over it——

"* * * and if accepted by the Government is executed by the Government and we receive the award. The announcements, the press release simply announces that negotiations will be entered into at some later date, usually embodied or specified therein, but it itself is not a basis upon which any commitment is made by the vendor."

The stenographer wrote "by the Government"; you struck out [529] "by the Government" and initialed it, and it reads:

"* * * but it itself is not a basis upon which any commitment is made by the vendor."

Mr. Dinkelspiel: Counsel, permit me——

Q. (By Mr. Wolkinson): Did you make——

Mr. Dinkelspiel: Now, wait—your Honor please, permit me. You quoted what the stenographer did, and you misquoted it, counsel, I am sorry to say. The stenographer wrote "by the Government"—"by the vendor." Obviously the witness was correcting himself right then and there. Is that correct, Mr.——

(Testimony of Dwight K. Grady.)

Mr. Wolkinson: That is correct. I didn't intend to misread.

Mr. Dinkelspiel: You did.

Mr. Wolkinson: This is, I think, reads now as corrected by you.

"The announcement, the press release simply announces that negotiations will be entered into at some later date, usually embodied or specified therein, but it itself is not a basis upon which any commitment is made by the vendor.

Was that a true answer?

A. Yes, that it by itself is not a basis on which the contract is made.

Q. And I take that the press release that preceded countless [530] contracts which you signed had the effect which you described here in your mind, that is, you didn't rely on the press releases as contractual?

A. We always relied on the press release and subsequent communications with respect to the program as the basis for determining whether to sell or not to sell. [531]

* * *

Cross-Examination
(Continued)

By Mr. Wolkinson:

Q. Now, Mr. Grady, you indicated, sir, in direct examination that there was no difference of opinion between you and Arthur Oppenheimer concerning the shipment of the raisins in pursuance of the

(Testimony of Dwight K. Grady.)

government contract? A. That's correct.

Q. I take it then that Mr. Oppenheimer fully supports your position in the instructions which you issued to Laflin that you didn't have raisins?

Mr. Dinkelspiel: Now, let's be sure that that is what the witness testified.

A. I instructed Mr. Laflin not to ship. For some weeks it was impossible to ship because we didn't have the raisins. But my instructions——

Q. (By Mr. Wolkinson): When you say you didn't have them, you didn't have them in physical possession?

A. We didn't own raisins to ship against this contract. The instructions that I gave Mr. Laflin were given when I wired to the Secretary, or within a day or two of that, asking for cancellation of the contract. We were not going to do any shipping because in the normal course of business we are aggressively trying to acquire raisins as we make these sales, and I have no way of knowing definitely the rate of flow of raisins into us or the rate of shipment out. Those are routine [534] affairs that are handled by the shipping and manufacturing department. So that my instructions to Mr. Laflin were: "We are not going to ship; we are trying to get cancellation of these contracts."

Q. Did those instructions persist through the month of November, 1947?

A. They persisted until they were rescinded.

Q. And when were they rescinded?

A. In January.

(Testimony of Dwight K. Grady.)

Q. Approximately around——

The Court: Pardon me; what was that last answer? You said——

A. Until they were rescinded.

Q. (By Mr. Wolkinson): Until the orders to Laflin were rescinded? A. Yes.

Q. I understood that. And those orders not to ship because you didn't have the raisins were rescinded sometime around January 22?

A. I want to be very careful about this, counsel. You keep saying that I gave orders not to ship because we didn't have the raisins.

I think I have repeatedly told you, I gave him the orders commencement when we attempted to cancel the contracts, to get cancellation of the contract, and I told him that we were [535] not going to ship.

Now I didn't, as I have told you in my deposition, I didn't repeat each time that he got a request these instructions to Mr. Laflin. I gave him instructions not to ship.

Q. You remember on Friday I quoted from your deposition and I said "I recall your saying——" and I quote: (This is you speaking to Laflin.)

"Mr. Laflin, tell them we haven't got the raisins."?

A. That's right. [536]

* * *

Q. Would you like this Court to understand that the instructions you gave to Laflin on October

(Testimony of Dwight K. Grady.)

"Tell him we haven't got the raisins" were altered by you at a later time so as to state some other reason for not delivering?

A. No, I have never inferred that. What I said was that we are not going to ship and tell him we haven't got the raisins. [537]

* * *

HELEN McINTOSH

called as a witness on behalf of the defendant, sworn.

The Clerk: Please state your name, your address and your occupation to the Court.

The Witness: Helen McIntosh, M-c-I-n-t-o-s-h, 740-36th Avenue, San Francisco.

The Clerk: What is your occupation?

The Witness: I'm now working with my father in the construction business.

Direct Examination

By Mr. Wolkinson:

Q. Miss McIntosh, I take it you have never been in a court room before?

A. I never have.

Q. As a witness. This is your first experience. Well, we shall try to keep you at ease, and have you tell us exactly what you know.

I hand you this book entitled "Record of Purchases and Sales, 1947-1948," and ask you to take it, please.

(Testimony of Helen McIntosh.)

And I now ask you whether you had anything to do with [551] the compilation of a daily record, or a record every other day, or every third day under Mr. Oppenheimer's direction in this book?

A. I had everything to do with the sales, the sales portion of the record was done by me in my department. [552]

* * *

Q. (By Mr. Wolkinson): September 27. Look at the entries of September 23 and show me, tell the Court whether or not you made an entry of the 10,000 tons which are purportedly [560] sold to the Government in accordance with the sales tag, Defendant's Exhibit C?

Mr. Dinkelspiel: May I ask counsel this question: By using the word "purportedly" does he contend now that there was no sale to the Government?

Mr. Wolkinson: I make no contention.

The Witness: There was no entries in this book——

Mr. Dinkelspiel: Wait a second, Miss McIntosh, I am asking Mr. Wolkinson.

Mr. Wolkinson: I make no contentions; I am waiting for the facts to unfold themselves to the Court.

Mr. Dinkelspiel: Trying to get out of——

Mr. Wolkinson: I shall abide by the facts as the witnesses knowing the facts unfold them to the Court.

Mr. Dinkelspiel: I object to the use of your

(Testimony of Helen McIntosh.)

word "purportedly" in your question, and I have asked you about it, and that is the basis of my objection.

The Court: Delete "purportedly" from the question.

Mr. Wolkinson: All right.

Q. (By Mr. Wolkinson): Tell us what happened on that day with respect to this tag, Defendant's Exhibit No. C, and the tag underneath it, both of which, each of which is dated on the dates I mentioned?

Mr. Dinkelspiel: First, we might ask the witness under the system, Miss McIntosh, if it could be entered on the 23rd, [561] the subsequent date September 25.

The Witness: The day, the entry of the tag was 9/26. It wouldn't always necessarily be—I mean, during the busy season there is always a one or two days, maybe one way or the other this is entered, but I know thatsat this particular point these were not entered, because just looking at this I can see 10,000 pounds; of my total sales at that point were only 7,800.

Q. (By Mr. Wolkinson): Now, do you recall whether Mr. Oppenheimer issued instructions to you with respect to the entry of this contract, the first page of this exhibit, 9/23/47, in this record of purchases and sales, and if you recall tell us what he said concerning this exhibit?

A. Well, there were certain tags—he knew about the existence of practically every tag, but there

(Testimony of Helen McIntosh.)

were certain tags he definitely knew the existence of, and he did of this particular one, and we were told not to enter it until he told us to. [562]

Q. Now, will you tell the Court when for the first time you made any record in this book concerning these two contracts, or tags, of Defendant's Exhibit C?

A. Well, I know they were kept as a total and they are posted on October 1, they first appear, Government sale, 14,330.

Mr. Dinkelspiel: October 1st?

The Witness: October the 24th they appear only this listed over here, but not in the total.

Q. (By Mr. Wolkinson): Now, you are pointing——

A. This is my writing.

Q. You are pointing to the words——[564]

A. Government, G-o-v't.

Q. And read the figure. A. 14,330 tons.

Q. Now, that is in the margin?

A. That's right.

Q. Now, does the Government total of 14,330 appear on this October 24, 1947, page, also appear under total sales?

A. No, sir, it does not. [565]

* * *

Q. Now, these sales that you entered, do I understand that they are indefinite prices or definite firm prices as they appeared on the tags?

A. They are firm prices.

Q. And were your instructions to enter in those sales those sales which were at definite firm prices?

(Testimony of Helen McIntosh.)

A. That is correct.

Q. And whether they were sales to the Government or sales in the domestic or export trade, is that right? A. That is correct.

Q. Now, when is the next entry in this book that you have in your hand concerning Defendant's Exhibit C? Turn the page, please.

The Court: That is in chronological order, is it?

The Witness: Yes, it is. The latest on the top.

The Court: Going back to September? [566]

The Witness: No, I am going the other way, sir, from September forward.

They appear for the first time on—the report of January 30.

The Court: What appears, counsel?

The Witness: The Government sales.

Mr. Dinkelspiel: Just a minute, Miss McIntosh.

The Court: I can't follow it.

The Witness: Prior to——

The Court: Pardon me, please. Are you referring to these invoices, other invoices, or what are you referring to?

The Witness: No, the Exhibit C, Exhibit C invoices. Appear——

The Court: The next appear under date of January?

The Witness: January 30 is when they appear in my sales total. Prior to that they were kept listed in—not as part——

The Court: They were kept on the marginal account?

(Testimony of Helen McIntosh.)

The Witness: That's right.

The Court: They were kept persistently and consistently in the margin?

The Witness: That is right.

The Court: On each date?

The Witness: Until January. [567]

* * *

Q. (By Mr. Wolkinson): Was there in fact a persistent recording of that sale in this book beginning with the date when the marginal notation first appeared?

A. This is starting September 24——

Q. You are reading and fingering the pages starting September 24th. You skipped, I notice October 13. I don't think I asked you any question.

Do you find any notation of this sale under the total [568] sales on that date, October 13, 1947?

A. No, there is no notation.

Q. How about October 14?

A. October 14, no.

Q. Do you find any notation in the margin there?

A. No. No, there is no marginal notation.

Q. So that the pages you have just fingered, October 13th, 14th, and now you are turning to October 15th?

A. 15th. There is no marginal notation.

Q. Is there any other kind of notation of the government sale—— A. No.

Q. ——purchase of the two contracts, Defendant's Exhibit C? A. No, there is none.

(Testimony of Helen McIntosh.)

Q. Now you are continuing to finger——

A. October 17th, there is none; October 20, 21, 23. On October 24th it first appears. [569]

* * *

Q. Do you remember whether there was another contract of sale about that time?

I notice you went up from the October 24th entry of 14,330 to the marginal notation here of 16,330.

A. Well, there must have been, because that——

Mr. Dinkelspiel: That was another tonnage which is not in dispute here, because that price was an entirely different price.

Q. (By Mr. Wolkinson): There was another ——

A. That 16,330——

Mr. Dinkelspiel: That also——

Q. (By Mr. Wolkinson): It does not appear in your total sales?

A. It does not appear in the total sales. [578]

* * *

Cross-Examination

By Mr. Dinkelspiel: [602]

* * *

Q. The book was not always up to date, was it?

A. Well, it was always up to date except during the busy season when we worked far into the night, many, many times, in order to get it up to date.

Q. It is not your fault I am talking about

(Testimony of Helen McIntosh.)

A. No.

Q. You could only make the entries if you got the sales tags, isn't that right?

A. That's right. That's right.

Q. It is true, is it not, that many sales tags down in Fresno or elsewhere would take a certain amount of time before they came to you? [607]

A. Well, it would never come from Fresno. They always came from the boy who sat in front of me.

Q. Yes, but there would be a little delay sometimes before he got them?

A. Well, the usual business delay, I guess, but that never amounted to very much. I mean, I always—my copy was taken out of the tag prior to the double check and all of that, so that this statistical report could be kept current.

Q. So that you could advise or so that you could give Mr. Oppenheimer the pages of your book when he asked for it?

A. That's right, so he could get—he actually got a picture of the sales long before all the elementary work had been done on them.

Q. Now, Mrs. McIntosh, you said something this morning—something this morning that you said, that apropros of there being a gap of a week between two of the pages, that you only prepared the pages when he wanted them. Something to that effect. A. That's right.

Q. He did not tell you every day "Get me up a page," did he?

(Testimony of Helen McIntosh.)

A. He did during the busy season because he knew everytime a large sale was made. He didn't know when a 25-pound sale was made. But he knew before the sale was actually entered on the tag, when a large sale was made.

Q. So, for example, as he knew those government sales? [608] A. That's right.

Q. When did he first tell you about the government sales?

A. Well, I didn't ever know that there was a sale until it was actually given to me, as that tag was, and that was given to me on the day that it was typed. The day that it was typed, it was given to me. Because the boys had specific instructions to give me tags of sizeable amounts because they naturally affected his position.

Q. Will you tell me then, just for the purpose of the record, referring to the Defendant's Exhibit C, what was the date on which that was typed, if you can find out from the document?

A. Yes, I can. It was typed on September 26.

Q. 1947.

A. It was actually sold on the 25th. Wires came probably from and to Rosenberg concerning this sale. There is the entry department date, 9 26.

Q. Referring to 9 26.

A. That is the date which would appear in my book if that tag was entered on that date, because I always used the entered date.

(Testimony of Helen McIntosh.)

Q. You told us this morning, however, that that sale was not entered in your book on that date?

A. No, it was not.

Q. Did you see the tag on that date?

A. I saw the tag on that date. [609]

Q. And Mr. Oppenheimer told you "Do not enter it"? A. He did.

Q. And——

A. He said, "Just keep that tag and I will notify you when I want it entered in the book."

Q. You know of another government sale, do you not, of 4,330 tons in October of 1947—October 13, to be exact? A. Yes.

Q. And did Mr. Oppenheimer say the same thing to you with respect to that?

A. He told me to keep that one out of the record also.

Q. And you know of another sale, do you not, in November—November the—the latter part of November?

A. Well, I know there was a difference between 14,330 and 16,330. So there was a third tag of 2,000 tons.

Q. That's right. A. That's right.

Q. So, that does not happen to be in litigation here, but it is a fact, is it not, that Mr. Oppenheimer told you to keep that tag out of the books too, isn't that right?

A. When did that tag—when was the sale of that tag?

Mr. Wolkinson: I wonder if we may have that

(Testimony of Helen McIntosh.)

tag, if plaintiff has it, so the witness could accurately testify concerning it?

The Court: What was the date of that transaction, counsel? [610]

Mr. Dinkelspiel: November some time. Here I have the blue copy of that. I am perfectly happy to let the witness set it and counsel see it.

Q. I show you what purports to be another sale to Commodity Credit Corporation and ask you when that sale was made? I am showing you the blue copy of the sales tag.

A. This tag was entered on the 1st of December, 1947.

Q. Entered? A. Yes.

Q. In your book?

A. No, not entered in my book.

Q. Entered where?

A. Entered by the entry department.

Q. On the tag itself? A. On the tag itself.

Q. What date did you say?

A. December 1st, 1947. 12/1/47.

Q. Yes. A. This one.

Q. Do you recall Mr. Oppenheimer having told you not to put that in the book, too?

A. Well, it was considered a government sale and it went with the other two.

Q. I see. So the other sales did not go in the book?

A. Well, for this certain specific reason. [611]

Mr. Wolkinson: I didn't hear you.

A. For his certain specific reasons, of which I

(Testimony of Helen McIntosh.)

knew nothing. I mean, we were just following instructions, and that's——

Q. (By Mr. Dinkelspiel): That's right. So we have the two sales that are here in dispute, but one sale about which there is no dispute, that having gone through in ordinary manner and also which was not entered in the book, right? A. Yes.

Q. What was the occasion of your entering on October 24th—I think it was—making this marginal notation of 14,330 tons? You recall how you happened to make it then?

A. Yes. I recall it at the time this—Evidently this figure didn't—This sales, total sales figure, was actually not a true sales figure because it didn't include those tags that were not entered, and in order to get a true picture of his position he had to know, and rather than to keep reminding him that he had that particular amount, we just put it up there, and he mentally added it.

Q. Well, did you remind him of it beforehand?

A. He asked me to put it up there because between the time—We just—when Miss Keeley took him the book, why, she——

The Court: What is the date?

A. October 24th.

Q. (By Mr. Dinkelspiel): He asked you to put it down there? A. Yes. [612]

Q. So he could remember it?

A. Yes, I guess so.

Q. Well, Mr. Oppenheimer had a——

A. He did.

(Testimony of Helen McIntosh.)

Q. ——pretty fine memory, didn't he?

A. Yes.

Q. You are not suggesting to his Honor he would forget a 14,330 ton sale?

A. No, I am not. No, I am not, but—— [613]

* * *

CAROLYNE CHASE

called as a witness on behalf of the defendant, sworn.

* * *

Direct Examination

By Mr. Wolkinson: [626]

* * *

Q. (By Mr. Wolkinson): Did Mr. Oppenheimer speak to you on or about that day, or at a later date in October, concerning Defendant's Exhibit C, which I show you, these two tags?

Mr. Dinkelspiel: If your Honor please, I think this witness has not qualified herself to answer this question. As I understand it, she kept the purchase side of this record, not the sales side. If I am wrong in that, the witness, I guess, can correct me.

Mr. Wolkinson: Just trying to find out if he issued any instructions to her. If not, there is nothing further to say about it.

Q. (By Mr. Wolkinson): Did you understand the question?

A. Yes. He told me when I entered this Clinton

(Testimony of Carolyne Chase.)

Anderson that Albuquerque had come out with an order for 30,000——

The Court: Pardon me, I can't hear.

The Witness (Continuing.) (Inaudible to the reporter.)

The Court: I can't hear. Sorry.

The Clerk: Mrs. Chase, will you speak up louder, please?

The Witness: He told me that we were, the Government [633] was going to buy 30,000 tons of raisins, and we were to get 10,000 tons, and to keep it in mind. And then a couple of weeks after he told me about another order, 4,400 tons, and always kind of keep that in mind in figuring up this tonnage here. [634]

* * *

Q. You did not figure price later contracts in reflecting the long and short position?

A. It was a strict rule with the company that we could not include price later contracts, because that is not our—a definite price, but, when it would be a definite price, we would transfer from our price later into our firm purchases, and then it would become a firm—then we could consider that as—— [636]

* * *

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II

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No. 14884

United States
Court of Appeals
for the Ninth Circuit

COMMODITY CREDIT CORPORATION,
Appellant,

vs.

ROSENBERG BROS. & CO., INC., a Corporation,
Appellee,

and

ROSENBERG BROS. & CO., INC., a Corporation,
Appellant,

vs.

COMMODITY CREDIT CORPORATION,
Appellee.

Transcript of Record
In Two Volumes

Volume II
(Pages 333 to 682)

Appeals from the United States District Court for the Northern District of California, Southern Division.

FILED

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—1-27-56

FEB 2 1956

PAUL P. O'BRIEN, CLERK

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(Testimony of Carolyne Chase.)

Cross-Examination

By Mr. Dinkelspiel: [652]

* * *

Q. So we may have the record in brief form, the increase in total purchases which you entered in your records here as closed contracts was the difference between 27,879 on January 30, 1948, and 4,111 tons on September 25, 1947, or a difference of 23,768 tons? A. Between that period.

Q. Between that period. And in that same period, referring now to your notes, sales, there was an increase only of 8,845 tons, exclusive of government contracts?

A. Here, we are talking sales.

Q. I know. I am asking you sales, here. We established that there was this——

The Court: 13,440 and the 2,000. [657]

Q. (By Mr. Dinkelspiel): The increase in sales as reflected in this book of reference, the position book, so-called, between September 25, 1947——

A. All right, here, 7,871.

Q. You have deducted that from the amount on January 30, 1948 of 16,716, exclusive of government sales, and you have come up with a figure of a difference of 8,845 tons? A. Tons.

Q. Is that correct, sales? A. Yes.

Q. Now will you take these two figures of, first, purchases, 23,768 as of January—the difference between September 25, 1947, and January 30, 1948?

A. Between 9-25 and——

(Testimony of Carolyne Chase.)

Q. And January 30?

A. And January 30, 1948.

Q. And deduct from that the difference, the increase in sales other than government contracts between those two periods.

A. Just the trade? Just the——

Q. Yes, just the trade.

Mr. Wolkinson: Look at your book for verification so that you know what you are doing.

Mr. Dinkelspiel: You have already testified——

Mr. Wolkinson: Let her give her—give her a chance.

Mr. Dinkelspiel: I will give her a chance. I am not [658] trying to put a figure in.

Mr. Wolkinson: I just want her to look at the book.

Mr. Dinkelspiel: If you want to drag it on longer, I don't care. That's your privilege.

A. Sales as of January the 30th——

Q. (By Mr. Dinkelspiel): Mrs. Chase, you don't understand me, I am afraid. It was my fault, the way I asked the questions.

You have already shown us the difference between purchases on September 25 and January 30, and that figure is 23,768.

I am now asking you to take a corresponding figure of sales between those two dates, which I believe you have already found as 8,845 tons.

A. Mr. Wolkinson asked me to check it.

Mr. Dinkelspiel: All right, go ahead.

A. That's what I am doing. 8,845.

(Testimony of Carolyne Chase.)

Q. Will you deduct that figure of 8,845 from the purchase figure of 23,000——

A. (Indicating pad.)

Q. So in the interval between the two figures, between the two dates, September 25, 1947, and January 30, 1948, the purchases exceeded the sales, exclusive of government contracts, in the amount of 14,923 tons, is that correct?

Mr. Wolkinson: Do you understand the question?

A. Our total sales from looking at the book——

Mr. Wolkinson: Would you wait just a second so I could [659] hear what you say, please? Our total sales—our total sales from September 25——

A. Our total sales from September 25-January 7——

Q. (By Mr. Dinkelspiel): Now, please, let's get back, if I may, to the question that I asked you.

You were kind enough to get all the figures together. All I was asking you, the last question, and maybe the court reporter could read it to you, was to subtract two figures.

A. Well, here it is, 8,845.

Q. Now, now, let's——. I am asking to go to January 30. You are on January 7, if I might suggest, and I was on January 30, to which I was directing your attention.

You have done this figuring and if it is a matter of correcting the accuracy——

A. Yes.

(Testimony of Carolyne Chase.)

Q. Well, here are your figures, Mrs. Chase. Here is your figure of increases in purchases.

A. This is our purchases and here is our sales.

Q. No, but you have got here——. Well, you have got—— A. It is the same thing.

Q. You have page 1, this little page here, you have got 23,768 tons, which represents, according to your testimony, the difference between the purchases——.

Mr. Wolkinson: Just a minute, she is trying to——

Mr. Dinkelspiel: I haven't finished the question, please.

Q. ——between the purchases entered in your books as of [660] September 25, 1947, which is 4,111, and the total purchases entered in your books on January 30—— A. 27,879.

Q. And you are deducting those two figures, leaving an increase in purchases, does it not, between those two dates, of 23,468? A. Yes.

Q. Is that correct?

A. That's our total purchases.

Q. That is the total increase in purchases as between the two dates? A. Yes.

Mr. Wolkinson: Just a minute. 23,768.

Mr. Dinkelspiel: 23,768.

Q. Now on sales—— A. Here's the sales.

Q. You have already made the computations?

A. 33,046. And the government 16,330—for the government—and that left a net of 16,716 to the trade.

(Testimony of Carolyne Chase.)

Q. (By Mr. Dinkelspiel): To the trade?

A. As of January 30th.

Q. As of January 30. A. Sales.

Q. And on September 25 it was 7,871?

A. 7,871. [661]

Q. Or a difference of—— A. 8,845.

Q. And subtracting the 8,845 from the 23,768 gave you a figure of—— A. 14,923.

* * *

DWIGHT K. GRADY

was recaalled as a witness on behalf of the plaintiff, previously sworn.

Cross-Examination
(Resumed) [662]

* * *

Q. (By Mr. Wolkinson): Now, Mr. Grady, I believe you testified on direct testimony that there came a time in 1930, along about the end of January, that a decision was made by the five [illegible] which you then worked to deliver the raisins to the Government?

Mr. Dinkelspiel: You said '30.

The Witness: 1930?

Mr. Wolkinson: I beg your pardon, January 30 is the date, around January 30, 1947.

Mr. Dinkelspiel: 1948.

Q. (By Mr. Wolkinson): 1948, and in January.

(Testimony of Dwight K. Grady.)

A. At the end of January, 1948, we decided to ship.

Q. And would you please tell his Honor what was the reason for your decision to deliver the raisins to the Government at the end of January, 1948?

A. Well, there were a number of reasons. We had the raisins. It is necessary to, in a business like this, to keep going. We had raisins to deliver and decided that we would deliver. I had received advices some weeks before to the effect that I could either deliver or not deliver, without impairing the rights of the company.

Q. From whom did you get your advices?

A. From my counsel and attorney here in San Francisco.

Q. Some weeks before?

A. Oh, yes, right after I talked to him, the same week that [663] I had wired asking for cancellation of the contract, told him what I had done, and I asked him what he thought about it, and he concurred in the action we had taken at that time. [664]

* * *

Q. (By Mr. Wolkinson): In response to a question by Mr. Dinkelspiel that you consistently tried to buy raisins as sales were being made, is that about right?

A. I said that the company consistently tried to buy raisins.

Q. And that it was a policy of the company, and

(Testimony of Dwight K. Grady.)

I remember [675] how you illustrated with your hand, as you buy—as you sell, so you continue to buy to fill those orders?

A. Yes; the company kept on doing business, trying to do business.

Q. What I am getting at is: Assuming that you made a sale, let us say today, for your company, assuming you are with it today, of 4,000 tons, when would you attempt, if you didn't have the raisins today, to make the purchase to cover that sale, if you followed the normal business practice of the kind that you answered and gave details of last week?

A. Well, the operations are virtually simultaneous. As I said, when you're buying you're selling, and when you're selling you're buying. That is the normal relationship.

Q. And there is not much of a lag, if normal business practice is followed, between the time that you endeavor to cover or buy, by purchase, from growers, a sale which you have made in, let us say, commercial tonnage?

A. You say there is not much of a lag?

Q. Yes.

A. There may or may not be, depending upon market conditions, willingness of growers to sell, the trade to buy and so on.

Q. Well, insofar as efforts of Rosenberg are concerned, is there a lag, assuming that market conditions are that you can buy in the market?

A. No; there would be pretty much of a continuous operation [676] in both buying and selling.

(Testimony of Dwight K. Grady.)

Q. Assuming that the grower is willing to sell and Rosenberg is willing to buy at a firm price and a sale is made by Rosenberg today, in normal practice would your efforts to acquire those raisins be almost immediately following the sale of those raisins?

A. Well, raisins are bought right straight through the season and——

Q. But that doesn't answer my question. I gave you a specific instance.

A. Normally purchases proceed as sales are made. [677]

* * *

Q. Now, with respect to physical possession in normal course it is to the growers interest to turn his raisins over physically to Rosenbergs when Nature has completed its process of drying on those trays as promptly as possible?

A. I would say, generally, yes, when the raisins are cured, the grower passes them on to the packer who assumes all the risks from that point on.

* * *

Q. All right. Now we move along, Mr. Grady, to September 8. I last asked you about September 4. On September the 8th, after the announcement was issued in which you say you would like to believe there was a guarantee of a 60,000 minimum raisin purchase, following that announcement, three days later, your short position increased from 1,648 to 1,715 tons on your commercial purchases, is that right?

A. Well, our—yes, on purchases recorded, the

(Testimony of Dwight K. Grady.)

sales and purchases recorded.

Q. Now your purchase—your price later contracts increased from 2,400 tons to 3,100 tons?

A. That's right.

Q. So that you were, for the firm, the firm at that time was taking the position, was it not, that on its price later contracts it had hopes of acquiring raisins at a price somewhat below the price that it was selling its raisins for at that time in order to make a profit?

A. Based upon the conditions of the industry at the time and the announcement of the Government as to an insufficient program, it would have been a wholly justified expectation that [710] the market would go very much lower. It did go lower.

Q. Right now your calculated risk, at that time, your calculated economic risk on your commercial sale was therefore to increase your short position slightly between, in three days, because you calculated that raisin prices would go down in the future with the program as announced, is that right?

A. No. We—the only way we could buy raisins in the month of September or contract them was on open price contracts. Nobody would sell. The industry was demoralized; it was thrown into chaos by the announcement of this program. Growers were unwilling to sell. They were being urged not to sell. Packers were unable to buy at firm prices.

My company bought 11 tons in that period of September, and the only way that you could buy raisins under contract was on open price contracts.

Q. I ask you now, if that was the situation after

(Testimony of Dwight K. Grady.)

the announcement, what prevented Rosenberg Bros. & Co. from covering its shortage between August 6 and September 4, which grew from 1,089 to 1,648 before the program was ever announced?

Mr. Dinkelspiel: I think that has been asked and answered, your Honor. He is talking about the condition of business and the practices of his company, and why do we have to go over it again?

The Court: I thought he answered. Perhaps you may answer it again. [711]

The Witness: Well, in normal practices in the industry, when I say "normal," I mean that generally growers do not sell until they know definitely that they are going to have raisins. I think I went at some length, your Honor, as to how growers decided that, a few days ago, the fact that they have grapes which are capable of being used in three different channels, as fresh, wine purposes, and for drying. So that contracts normally are not entered into between producers and packers in any general way until after the 1st of September. [712]

* * *

Q. Would you say that as of that date and before you made any bid in estimating your commercial sales and purchases, which you expected to cover them, your estimate was that you would be better off financially to price your contracts later and to remain in that short position?

A. No; that——

Q. Is that a fair statement?

A. No; that isn't a fair statement——

(Testimony of Dwight K. Grady.)

Q. Do you——

Mr. Dinkelspiel: Let him answer. [715]

Mr. Wolkinson: Just a minute.

The Witness: May I answer your question? You asked me if it was a fair statement. I say it wasn't a fair statement because we were unable to buy for cash at the time those contracts were being made, and the only way we could secure assurance of supply, necessary to stay in business, was under open price contracts.

Q. (By Mr. Wolkinson): So that the open price contracts, you say, were forced on you by what?

A. By the fact that growers would not sell for cash. As I told you, the market was in chaos at the time.

Q. Do you see any difference in your calculations economically between the position which you took prior to September 4, when there was no announcement and when you were short on commercial sales, and the position which your company took on September 17 when you continued to be short on your commercial sales? Please look here and tell his Honor.

A. The position that the company was in was that it was confronted by a declining market brought about by this announced insufficient program.

Q. Just a moment. I am speaking before September 4, when there was no announcement of any program.

A. On September the 4th——

Mr. Dinkelspiel: Wait a second, counsel, that

(Testimony of Dwight K. Grady.)

is not true. There was no—the witness has testified there was [716] no formal announcement. You know and you will prove undoubtedly from Senator Anderson that he made a speech on August 4 talking about an intended program and in the intervening months there was much speculation as to what happened. Certainly Senator Anderson will tell us that, I am sure.

Mr. Wolkinson: For the record, at least, the plaintiff didn't go into that speech, so far.

We have here the announcement, and I want to restrict this to that.

Q. (By Mr. Wolkinson): Prior to the announcement of September 5, your firm deliberately and assuming the calculated risk that you have testified to, took a short position on its commercial sales, is that right?

A. Its sole business at that time, yes.

Q. It sold short on its commercial sales?

A. Yes; that's right.

Q. And it continued to sell short in the same relative manner after September 4 up to September 17, isn't that true?

A. Yes; in a declining market. [717]

Q. All right. Now, then, if the program had stayed as announced in that original announcement your firm would have benefited on its commercial sales by that declining market, would it not?

A. I expect that it would have been able to cover with a profit in its purchases from growers prior to those contracts.

(Testimony of Dwight K. Grady.)

Q. And you estimated to Mr. Oppenheimer, you indicated to me, and if I am wrong, correct me, but the market would go down to $80 a ton if the Government Purchase Program had not been announced, is that true?

A. My statement to Mr. Oppenheimer was my conviction that the market, if left alone, and the crop turned out the size that it was, could go to $80 a ton, yes.

Mr. Dinkelspiel: After the Government's announcement?

The Witness: No; I think that was prior to any Government program.

Q. (By Mr. Wolkinson): Now, after the Government Announcement you said to us your calculated position on commercial sales was, as reflected by this record, that prices would continue to go down?

A. Yes; we were convinced that the program had demoralized the market.

Q. All right. And acting on that conviction and up to October 7, when you made your second offering to the Government, you increased your short position to 6,176 tons on your [718] commercial sales?

A. On October 8 that book shows that short [illegible]

Q. Yes; you have total sales 10,287 and total purchases still constant at 4,111, is that right?

A. That's right. We couldn't buy any tonnage to speak of at all.

Q. But you increased your price later [illegible]

(Testimony of Dwight K. Grady.)

to 14,608, as of October 8th? A. That's right.

Q. And had your guess proved correct that that program guaranteed that it would not go up you would have bought the price later contracts substantially below the purchase price of 7.06 reflected here, would you not?

A. We expected to buy raisins at a price which would permit us to cover the Government commitments.

Q. I am not speaking of the Government. I am now speaking of total sales.

A. Well, all sales. [719]

* * *

Q. (By Mr. Wolkinson): Mr. Grady, during your deposition on or about the middle of August in plaintiff's lawyers offices, I asked you whether—I asked you what it was that was responsible for your making a decision in January to deliver the raisins at the contract prices, and do you recall what your answer was?

Mr. Dinkelspiel: If your Honor please, if he is going to question the witness as to his deposition, and if it is only for impeachment purposes, he should refer him to the deposition.

Mr. Wolkinson: No; it is not.

The Court: I assume this is preliminary in nature. You may answer. [789]

Mr. Dinkelspiel: I want to register my objection, your Honor. I don't think it is proper examination to ask the witness without the deposition

(Testimony of Dwight K. Grady.)

before him, what he recalls having said. I think the orderly progedure is to ask him the question fresh, and then if he differs from what he said in the deposition, read him the deposition for impeachment purposes.

The Court: The witness may recall, however, without the aid of the deposition. That is merely a device or an aid for a witness. This witness may recall the precise matter. I do not know. If he doesn't recall, he can resort to the deposition.

Do you have any recollection?

The Witness: I think my answer was to the effect that we had the raisins and therefore decided to ship them as being the best practice of good business judgment.

The Court: In short, if I may go back for one minute, you state you had legal opinion. Legal opinion stated you could either ship the raisins or rest on non-delivery, take one or the other position?

The Witness: Yes, sir.

The Court: And on or about January you decided to ship?

The Witness: We decided to ship.

The Court: To adopt that alternative proposition?

The Witness: Yes, sir. [790]

* * *

The Witness: I don't know how to answer it. We buy raisins. We determine our costs as we go along. The cost of raisins and selling prices are all

(Testimony of Dwight K. Grady.)

part of position and we don't pull out a ton of raisins or something and say, "This is against that particular thing." We are trying cumulatively to do business as processors of raisins. So we buy all the raisins we can get a hold of and we try to take care of our business.

Now in setting up this point, and I might say parenthetically [841] that the claim was filed in the hope that it would through further negotiations and through a conciliatory approach be worked out on some basis. For that purpose you have got to set up a measure. The best measure that we had was to match the acquisition cost of raisins against the sales price and determine the difference. That sets up a claim in its magnitude. That claim was intended as a basis for negotiation. We were entirely conciliatory. We didn't even want to file the claim after it was prepared (you will remember Senator Downey said we called on him because we wanted his judgment as to whether we should file it). We didn't like the way it looked. But it did set up as fairly as we in our best judgment could set up a claim.

We had sales obligations, we had purchase obligations. We acquired the raisins. We acquired them during the months of September, October and November. We determined the weighted average cost of those raisins and applied that against the weighted average cost of the contract—of the selling price of the contract.

(Testimony of Dwight K. Grady.)

That set up the discrepancy between them which was the tabulated claim and that is all it did.

I didn't use this book. I had nothing whatever to do with the book when I was in Washington. I knew about it, but it had nothing to do with the setting up of this deal.

This was just as though we were preparing a submission of [842] a brief for arbitration. We set up what we estimated to be our loss. We put it in the hands of an arbitrating body, we thought, to look it over and see whether the claim was fair, whether there were any questions about it, if we could discuss it, negotiate it, and get down to a basis of settlement. [843]

* * *

The Court: If I may paraphrase counsel, so we can conclude, the next point is this: How do you account for these communications sent to the Secretary or to his subordinates that this merchandise or commodities were not moving into the Fresno warehouses when in truth and in fact [844] you now assert that commodities were moving in as reflected in your present claim?

A. Well, your Honor, in the first place, I have only seen one communication dated October 21st, if my memory serves me correctly—it's about that time—in which the statement was made that raisin movement had come to a complete standstill, there were no raisins in our possession, we couldn't get raisins and therefore we weren't going to ship.

My instructions to Mr. Latlin at that time were to

(Testimony of Dwight K. Grady.)

that effect: "Tell them we haven't got the raisins," because we didn't have them. As a physical matter of fact you couldn't buy raisins from the producers during that chaotic period. What Mr. Laflin said thereafter has, I believe, been inferred by counsel for the Government. I have seen no evidence that that statement was repititiously made by Mr. Laflin.

Now, it may have been. Mr. Laflin, as a matter of fact, did come and talk to me, and occasionally to Mr. Oppenheimer, "Are we going to ship the raisins?" "No, we are not going to ship. Tell them anything you want to tell them," words to that effect, if he asked the question.

Now, all I remember, we were stubbornly adhering to a position: We would not ship.

The Court: Were you hoping for cancellation—weren't you at one time?

A. Yes; at the October date level we were hoping that they [845] would cancel and go out and set up a program that would actually do the kind of a job that was wanted; let us know, first, what kind of a price they wanted us to pay.

And on October the 15th I wired to the Secretary and said: "If you will cancel our contract, we will go out, we will cancel our contract with the growers, and we will go out and establish a price of $140."

The Court: Well, if you were hoping for cancellation, how was it that you were acquiring the commodities under the contracts in order to fulfill the sale? Why would you do that?

(Testimony of Dwight K. Grady.)

The Witness: As a matter of business prudence, sir, when you have commitments on the books—I couldn't conclude they would cancel—we had to go ahead just as though we had contracts. The time came, and relatively shortly thereafter—that is, in the month of November—that we were given hopes of renegotiation. By that time it had become a matter of adjusting the price of the contracts and not a question of cancellation. [846]

* * *

CLINTON P. ANDERSON

was called as a witness on behalf of the defendant, sworn.

The Clerk: Senator, please state your name for the record.

The Witness: Clinton P. Anderson.

Direct Examination

By Mr. Wolkinson:

Q. Senator Anderson, in or about the months of August and September, 1947, were you Secretary of Agriculture of the United States? A. I was.

Q. And did you at that time devote all of your time and duties in the performance of those duties?

A. Yes. I was also Chairman of the World Food Board, and spent some time at that, but that was really the responsibility of the Secretary of Agriculture. [862]

(Testimony of Clinton P. Anderson.)

Q. The World Food Board, you represented the United States Government as Secretary of Agriculture on that Board?

A. Yes, but I was chairman of it, and had the main responsibility of the allocation of food around the world.

Q. Senator Anderson, subsequently you were elected a Senator of the United States. Could you tell us when that was?

A. I was elected in November of 1948. [863]

* * *

The Witness: I went to the—I had been the guest of President Hoover at the Bohemian Grove, and I drove across to the Yosemite Valley, and representatives of newspapers met me at the Ah-wah-nee Hotel. They said that the raisin situation was a very warm situation and they would appreciate my comments on it.

I told them I intended to speak the next day to a farm labor meeting, but that in general I would give them some ideas.

I had just been at the International Cereals Conference in Paris during the month of July. Previous to that I had been in Germany and had had members of my party in Poland and in Czechoslovakia trying to calculate the food requirements [868] of those countries.

I had expressed at the Paris Cereals Conference

(Testimony of Clinton P. Anderson.)

my conviction that there would not be enough wheat to go around and that I saw no reason why these European countries should not utilize the dried fruits which were existent in the State of California.

As a matter of fact, we had had some trouble persuading them to use the fruits in the Mediterranean area. I saw no reason why the only appeal they could make to us was wheat when our wheat markets were already in bad situation because of requests I had made upon them.

I said to the newspapers there, either there or at the press conference the next afternoon, I would be happy to be corrected about it, but at one place and probably at both, that I was anxious to skim off the surplus of dried fruits and that I felt it was a proper use of our funds.

I am not trying to say all that was said in Yosemite, because some of it was said again the next day at Fresno. At least, I was thinking as consistently as I could of what we might do to relieve a problem that was acute in California and at the same time acute in the other parts of the world.

And my sum and substance of what I tried to say in that conference was that if the peoples of Europe wanted our co-operation they would have to make use, not only of the things which were scarce in our country, but of the things [869] which were in surplus in our country. And fruits were a part of that.

The Court: You had the statistical data, naturally, that emanated from California with respect

(Testimony of Clinton P. Anderson.)

to possibilities of 100,000 tons surplus, did you, in raisins?

The Witness: I had that in a few days, Your Honor, and I will come to that.

The Court: Proceed.

The Witness: To answer you specifically, the information was presented to me in San Francisco about the 4th of September, but also in a preliminary fashion in Fresno the next day. I did not have it in the Yosemite Hotel. I went the next day to Fresno. There was a noon luncheon attended by a great many people, and at its conclusion there was a rather vigorous discussion between some members of the farm group, namely a man named Setrakian, as to the desirability of establishing a firm support price for the raisin crop. The California Farm Bureau Federation was also represented there, and presented me there the suggestion of a 90 per cent support price for the raisins crop.

I am quite sure Mr. Setrakian had in his mind a one hundred per cent support price program.

We had just a brief discussion at the end of the room about it, and then I went on to a press conference at which again I was asked a good many questions, and in that press [870] conference I am very sure that I then said again that I intended to skim off the surplus. By that I meant simply this: That we had been engaged in support programs that were as unpleasant to me as they were to the newspaper columnists.

I bear a good many scars from the potato pro-

(Testimony of Clinton P. Anderson.)

gram. I bought and disposed of thousands of tons of potatoes while people were starving in Europe, and it seemed impossible for people to understand why I would buy those potatoes and dump them. Of course, it was impossible to ship them to Europe. I shipped one entire boatload of potatoes to Europe; they were watered when they got to Italy.

The Congress had the responsibility of changing the potato support price program. I did not support them because of a desire. I supported them because they are the law under the Steagall legislation. And yet day after day, day after day the Congress had a good deal to say about the potato support program.

Therefore, I was determined not to take dried fruits, California fruits, and handle them in the same fashion where I could be accused of wasting the products. I only wanted to take as many as might be necessary to stabilize grower prices, if it could be done, and not more than I felt I could use in three ways: (1) by the school lunch program; (2) by the program of regular shipments to our Armed Forces [871] and those countries over which the American flag was flying abroad; and (3) by subsidizing export into the Northern countries where dried fruits are a very important part of their diet, and a very valuable part of their diet.

Therefore, I tried to say to the people, the press conference and elsewhere, that we would take as much as we could to serve those purposes. [872].

* * *

(Testimony of Clinton P. Anderson.)

The Court: The Senator is not a party in the sense he is a party defendant, but yet he is a vital part of this litigation, and I am inclined to the view we should proceed as best we can in question and answer form. But at the same time I think the Senator should have some latitude in expressing his own opinions as to the background and the facts leading up to this situation. [873]

* * *

Now, on the 4th day of August, I, at the conclusion of the press conference, spoke at the San Joaquin Valley-Fresno Memorial Auditorium and the speech was broadcast through the McClatchey network, at 3:30 to 4 o'clock, and many copies of the speech were circulated, and the speech I think was fairly widely printed, so that I do believe it got attention, perhaps.

In that I pointed out that: "Co-operative planning and self-help in the California dried fruit industries are essential corollaries of government assistance * * *"

I pointed out that: "The Department of Agriculture will do its utmost to help dried fruit producers by opening outlets not available to the industry through its regular commercial operations. However, the Department will not undertake dried fruit purchase or loan programs that would lead to waste of product. Law requires us to support potato prices regardless of whether uses can be found for the potatoes we are [874] forced to acquire. That

(Testimony of Clinton P. Anderson.)

has led to criticism of our program and sarcastic comment on the occasional destruction of surplus potatoes at a time when there is hunger in the world. Yet we only acquired those potatoes as the law requires us to support prices. We have put this question clearly before Congress, and Congress has not seen fit to change the law.

"However, no law requires this type of action on dried fruits, and I shall not deliberately duplicate our potato program in the dried fruit industries by underwriting prices at a fixed level. Such a program would jeopardize the future of governmental assistance to the industry.

"The Department plans in general to take these types of action: to encourage maximum use of dried fruits in foreign relief feeding programs and to purchase the maximum quantities that can be used in the national school lunch program. In addition, the Department will consider the practicability of subsidizing commercial exports of dried fruits, particularly prunes and raisins."

Now, I quote directly from that because it indicates the difficulty of establishing the maximum limits of a program——

Mr. Dinkelspiel: If Your Honor please, I ask the Senator not be permitted to state what it indicates. [875]

The Witness: Very well.

Mr. Dinkelspiel: What he said must stand for itself, not something he had in his mind.

Mr. Wolkinson: I think we ought to have

(Testimony of Clinton P. Anderson.)

what went through the Senator's mind as a responsible public official charged with the grave responsibility——

Mr. Dinkelspiel: I submit——

Mr. Wolkinson: ——of aiding producers and the industry——

The Court: Insofar as the intent of the program is concerned, his notions, ideas, and hopeful expectations might be gone into; to that extent he is entitled to testify.

Mr. Dinkelspiel: I respectfully suggest that the Senator's unexpressed intent is not binding upon this plaintiff.

The Court: That's true.

Mr. Dinkelspiel: I object to this line of questioning. If Your Honor wishes to let in in, I will let the objection ride.

The Court: The objection is noted and overruled.

Mr. Dinkelspiel: What is the Senator now reading from?

The Court: Still reading from that dispatch of the McClatchey broadcast.

The Witness: No, I was reading——

Mr. Dinkelspiel: No, he is not, Your Honor, it is something from a copy of the same thing, but it is something on the stationery of the United States Department of [876] Agriculture, Office of the Secretary, Washington, August 4, 1947. "Note to correspondents: Following the summary of remarks by Secretary of Agriculture Clinton P. Anderson at annual meeting of the Agricultural Labor Bureau

(Testimony of Clinton P. Anderson.)

of the San Joaquin Valley, Fresno, California, etc., etc."

Just for the purpose of identifying it, Senator.

The Witness: I think it is referred to in the Fresno paper as well. And the only part of it that I wanted to comment on was that at the time this was delivered there was no way by which I could tell or anyone in the industry could tell, what the maximum use of dried fruits in the foreign relief program would be, what the maximum quantities we might be able to purchase for the school lunch program would be, and what we might be able to do toward subsidizing commercial exports of dried fruits, particularly prunes and raisins.

Now, following that, I went to San Francisco and the Bank of America arranged a luncheon at the Mark Hopkins Hotel, which was attended by representatives of the Farm Bureau, Mr. Ray Wiser, representing the Farm Bureau; the Grange, represented by George Schlmeyer; Harry Creech, representing the Rice Association; a representative of the College of Agriculture, Dean Hutchison; and including also people from the industry, such as Dwight Grady, Frank Wilcox, Frank Shay, and various other individuals. [877]

I attempted at that time to try to find out what the industry believed would be the best possible program for the Department to follow.

Many people made comments. I am not trying to quote any of them because I made no notes on what any individual told me. It was designed purely to

(Testimony of Clinton P. Anderson.)

give me an opportunity to try to get the expressions from California people as to what might be desirable.

I met later that afternoon with the California Farm Group specifically and again had a discussion of what the program ought to be, what we thought it might be, and what they would suggest that we do. Again and purely exploratory. No decisions were possible at that time, except my general decision to try to be helpful.

I told them that Mr. Sy Smith, who was head of the Fruit and Vegetable Branch, would remain in California for quite a while. I expressed the hope that they would try to get together with him in working out a program.

Time after time at that meeting I suggested the desirability of the group gathering together the complete surplus and disposing of it as the citrus industry had done. I pointed particularly to the fact that citrus fruits had been piled up and sprayed with oil and burned in order to control the size of the crop. I said we weren't asking them to provide the oil to burn up any crops. We would like to take [878] them and we would like to take their surplus but we had to take them at prices that we can move them to these countries where problems of foreign exchange were a problem and also where we could sell them to the Army, which was, to be sure, somewhat of a tough trader at that time. And I hoped that they might work out with Mr. Smith and with other representatives of the Department resident in California a

(Testimony of Clinton P. Anderson.)

program which they could submit and which I could approve.

I jumped from that to my return to Albuquerque from Hawaii on the 3rd or 4th of September.

* * *

The Witness: I have been trying to find a copy of the press notes made about that time.

But, in any event, upon my return to Albuquerque, a number of members of the staff were present because we were to have some meetings with Forest Service people and they wanted me to [879] spend some time there. But to clean up the question——

Mr. Wolkinson: This is attached to the complaint, Exhibit A (handing witness).

Mr. Dinkelspiel: May I ask what the document is that is being referred to?

Mr. Wolkinson: It is attached to your complaint as Exhibit A, and if the Senator wants to refer to the press release or announcement of September 4 or 5, I thought I would place it——

The Witness: It was September 5. Mr. Nathan Koenig, who had been my administrative assistant; Mr. Jess Gilmer, whose name is already in the record, and others met me at Albuquerque and acquainted me with a docket which had been adopted by the Commodity Credit Corporation late in August.

I supplied a copy of that docket earlier, and I do not have it now.

But they had prepared a text of announcement,

(Testimony of Clinton P. Anderson.)

which is to be released from Albuquerque. That announcement, which is in the record, shows that the Commodity Credit Corporation will purchase 133,000 tons of various commodities, including dried apples, dried peaches, dried prunes, dried raisins, and, using the language, "if the purchase of this total quantity of dried fruits is necessary to provide outlets for the relatively large 1947 production."

This was a price support program—— [880]

* * *

The Witness: I was a little surprised the other day—if it is not in order to get into this now, I will be glad to get into that later—at the testimony of Mr. Grady distinguishing between a purchase program and a price support program.

Nothing could have been more misleading, in my opinion, than the attempt to differentiate between a purchase program and a price-support program, when the law says that the Secretary and the Department of Agriculture shall support prices by purchases, loans or other methods.

We sometimes support prices by loans; we sometimes support prices by purchases; and there have even been proposals by one Secretary of Agriculture that we allow agricultural prices to seek their own level and supplement the income by production payments.

The Court: I think possibly, Senator, he referred more vividly to the question of the payment of price for $135 under the second program wherein he assumed to point out that you were in a com-

(Testimony of Clinton P. Anderson.)

petitive position when the price was paid for $135. But you may meet that at a later time.

The Witness: I merely want to say it was a price support program because we were using certain funds for it. We had no other way of doing it except to do it on the basis.

Mr. Dinkelspiel: Maybe the Senator would like to refer, [881] your Honor, to the second and last paragraph of the announcement, which says that it is not a—does not provide price support. Maybe he can then explain and find that he and Mr. Grady are probably not very far apart.

The Witness: Oh, we are a long way apart, because there is not a differentiation between purchase programs and price support programs.

Mr. Dinkelspiel: Will you read the next to the last paragraph?

The Witness: Yes. The entire program of lending price support to a farmer is a price support program.

Mr. Dinkelspiel: Maybe——

The Witness: Sometimes you do it by supplying a level of price support, which may be 90 per cent or 60 per cent or 75 per cent of parity. Sometimes you do it by moving directly into the market and buying, as we had done in the apple situation many times, and we did in the prune situation in this very program, and which was participated in by Rosenberg Bros. even though they had been on a competitive basis. They took part in the prune program, just as they took part in the raisin program and

(Testimony of Clinton P. Anderson.)

the others. It was a customary way of supporting agricultural prices.

I wish to call attention to the fact that we did not limit ourselves to buy 61,000 tons of raisins.

Mr. Dinkelspiel: If Your Honor please, I submit that the [882] document itself is the best evidence, and I do not think the Senator, however austere his position may be, has any right to make a statement like that to the Court. [883]

* * *

Mr. Dinkelspiel: * * * Now, I submit, your Honor, for this witness to first volunteer a statement that there was no maximum set forth, when the words just belie his statement, the words of the announcement; and, secondly, for this witness to say what he intends without showing that intent was communicated to the public, of which Rosenberg Bros. were a part, or to Rosenberg Bros. itself, is not admissible evidence, I respectfully submit. [885]

* * *

The Court: Let us assume that the Senator's intent is expressed. I can't conceive that it would do any particular harm if it does not appear that the intent directly or indirectly was made known to any of the parties litigant before the Court. After all, I am trying the case, and I hope that I can sift one thing against the other. I can't conceive; I don't know what the Senator has in mind.

The Witness: I didn't intend to say it, speak of intent. I only intended to read from the press the document.

(Testimony of Clinton P. Anderson.)

The Court: Proceed.

The Witness: The press announcement said that the maximum limit of the program would be 133,000 tons, and that is the [886] maximum limit. It is put on there in order that there may be a control on the officials of the Commodity Credit Corporation and that the people within the branches may not exceed their contractual authority. After the maximum limit of 133,000——

Mr. Dinkelspiel: The Senator is not reading, I respectfully submit, from the report. The Senator is giving his view as to what he meant to say by this document, that this 133,000 was put out for his people to be guided by, not that anybody else should pay any attention to it, maybe.

The Court: Counsel, isn't that an interpretation that may be made by the Court as to what ——. I am not bound——

Mr. Dinkelspiel: All right, if Your Honor wishes the testimony.

The Court: I am not bound by what the Senator says. I am going to interpret what he says in the light of the facts. He may have had some very pious thoughts about this and notwithstanding those thoughts, there may have been distortion. I don't know but I think he is entitled to testify concerning the background of the issuance of these reports.

The Witness: I will read only the paragraph. The paragraph in full reads as follows:

"The maximum limit of 133,000 tons is divided into purchase of 2,250 tons of dried apples, 3,750

(Testimony of Clinton P. Anderson.)

tons of dried peaches, 61,000 tons of raisins, and 66,000 tons of dried prunes." [887]

The limit is on the 133,000 tons. The limit is not on 61,000 or 66,000 or any one of the individual items within the paragraph.

Mr. Dinkelspiel: Well, the speech is argumentative, isn't it, Senator?

Mr. Wolkinson: You needn't answer.

The Witness: It isn't argumentative. It is a fact.

Mr. Wolkinson: You needn't argue, unless it is time for cross-examination and unless the Court directs you to.

The Court: That is your construction, Senator?

The Witness: Yes.

Now, I am quite willing to state to the Court that in the language in which the press announcement was written, many people who read it can interpret it far differently from the way I interpret it. [888]

* * *

Q. Now, Senator Anderson, did there come a time later in September, on or about September 10, when an announcement, which is in evidence as Exhibit 9, Plaintiff's Exhibit 9, was issued announcing a purchase of 30,000 tons of raisins?

A. Yes. We bought two lots, 31,000 and 30,000 in the early stages.

I was of the impression that the first purchase was 31,000 and the latter one 30,000. It may be the other way around.

Q. Did you, personally, Senator, participate in the opening of the bids or did someone under your

(Testimony of Clinton P. Anderson.)

direction acquaint you with what happened following the first announcement which said that offer forms were going to be supplied to processors in order that they might bid for a purchase of 30,000 tons.

A. I participated in the opening of the bids.

Q. And what did you learn as a result of those bids which were submitted following the announcement of September 10th, [897] Senator?

A. Well, we were offered more than the amount of raisins that we could buy, substantially, and we bought the lowest 30,000 tons. [898]

* * *

DWIGHT K. GRADY

a witness called on behalf of the plaintiff, having been previously sworn, resumed the stand and testified further as follows:

Cross-Examination
(Continued)

By Mr. Fruit: [940]

* * *

Q. Mr. Grady, in preparing the bid to which I have referred, did Rosenberg take a factor or arbitrary figure for processing and handling or packing and processing and relate it (1) to the price it expected to have to pay for the naturally condition fruit and (2) the price it was bidding?

A. Well, let me answer you this way. Its bid price was made based upon its judgment and feel of competition and what it knew of the market. In calculating what it would have to buy raisins for

(Testimony of Dwight K. Grady.)

to get its money back or to make a profit, it would, by a rule of thumb method, apply the existing packing costs as we regarded them, less perhaps—plus the shrinkage in stemmer waste which would be reflected in the fruit cost as contrasted to the manufacturing cost.

Q. I am about to refer to Page 58 of Mr. Grady's deposition taken on behalf of the defendant in this case on August 13th, 1953. If counsel is ready I will read into the record, beginning at about the middle of the page on Page 58.

"Question: What I am getting at is on your bid of $151.00 a ton, how much did you allow in rough, round figures for processing or expenses of packing and processing? [949]

"Answer: At the time, I would say we were figuring about $35.00 a ton.

"Question: That would necessitate your company acquire its raisins at somewhere below $110.00 a ton?

Answer: That's right.

"Question: In order to arrive at some measure of profit?

"Answer: That's right.

"Question: The difference between the two being $116.00, and you would have to acquire them at seven, eight or nine, 107, 8 or 9 in order to have a profit?

"Answer: Yes."

Do you remember making those statements?

A. Yes, I think so.

(Testimony of Dwight K. Grady.)

A. Yes, I think so. [950]

* * *

Q. Do you recall any instance in which Rosenberg ever relied upon a press release in this period issued by the Government as a basis for contract? That is, did you ever rely upon a press release in such case as a contractual basis?

A. We relied——

Mr. Dinkelspiel: I object to the question, if Your Honor please. I want the Court to rule on it first, Mr. Grady, as referring to other instances which are not part of this case, as referring by nomenclature again to a press release which assumes facts not in evidence; incompetent, irrelevant and immaterial.

Mr. Fruit: May I say that this is simply a more limited version of the question to which an objection has been made and the objection overruled. The only difference between this question——

The Court: I will overrule the objection. You may answer, Mr. Grady, if you have any independent recollection.

The Witness: Well, Your Honor, my purpose in trying to answer this is to truthfully answer a question that narrows [953] down what we did in an effort to secure a statement, I presume, to the effect that we read something in the newspapers and then made commitments against that newspaper article. Obviously, the answer is no to that.

We did receive the information first in the columns of the press. We thereafter received copies of the announcement and other [illegible]

(Testimony of Dwight K. Grady.)

from the Government which we formed the basis of our submitting bids, and that was the story, and that is the whole story. We did not rely on a newspaper story or upon any one thing alone.

We went ahead after we had been given instructions, in fact, that these were the conditions and we entered our bids in reliance upon that background of information given to us. [954]

Q. Mr. Grady, if you did not rely upon the press release in this case as containing a governmental warranty or representation that it would bind only up to 133,000 tons of dried fruit and 61 tons of raisins, within that limit, for the purposes of your contract, upon what did you rely with respect to the alleged representation or warranty that the government would buy only 61,000 tons of raisins?

A. We relied upon the statements contained in an announcement that we received in our office and upon the statements made by the government officials that the program as announced on September 5 was the program that we were instructed to co-operate and expected to co-operate with that program.

Q. I am going to direct attention to pages 43 and 44 of the deposition of Mr. Grady taken on behalf of the defendants—the defendant, rather, on August 13, 1953.

Mr. Dinkelspiel. '43?

Mr. Fruit: I beg your pardon, it begins on 42. I am sorry. My thumb was in the wrong place.

Beginning at about the middle of the page, and I want to give you full opportunity, Mr. Dinkel

(Testimony of Dwight K. Grady.)

spiel, to repeat any objection you may have, because you did express an objection at that time. But I will read the entire passage to which I refer first, if I may.

"Question: Now, as an experienced official of Rosenberg Bros. & Co., charged with [955] responsibilities in connection with government contracts, had you been in the habit in the past of making commitments of a contractual nature for your company, financial commitments, in reliance upon press releases?

"Mr. Dinkelspiel: Wait a second. I am going to object to that question——"

Mr. Dinkelspiel: I will waive the objection, counsel; I permitted the witness to answer.

Mr. Fruit: Oh, all right. Proceeding, then, to page 43, the witness in answer to the question just read:

"Well, the answer to the question is no. The press release is a device used by the Fruit and Vegetable Branch to announce programs. The press release is sent to newspapers and it is sent to people in the industry, potential vendors and others having an interest. We received that by mail from the department, as the press release itself is following——"

Mr. Dinkelspiel: That is "followed"; that has been corrected there.

Mr. Fruit: May I use your corrected copy? Thank you. I assume that the original is corrected.

(Testimony of Dwight K. Grady.)

We hope so; will have the original deposition speak for itself.

(Continuing): * * * "followed by a formal invitation to bid in an offer to sell form. And [956] when that form reaches us and after we are satisfied with its terms and conditions and decide that we will make an offer to the government, we are guided by the form, which is a proposed contract, and if accepted by the government"——

At this point I would like to note both the original version of the transcript, I mean, of the deposition, as furnished us by the reporter, and then pick up the corrections, if I may. Is that satisfactory?

Mr. Dinkelspiel: Yes, but that is rather impugning the witness.

The Court: That may be noted in the record, subject to any explanation the witness has concerning the correction.

Mr. Fruit: Yes. Reading from the original copy of the deposition furnished us by the reporter from the point at which I left off, if the reporter would give me the last word.

(Record read.)

Mr. Fruit (Continuing): * * * "is executed by the government and we receive the award. The announcement, the press release simply announces that negotiations will be entered into at some later date, usually embodied or specified therein, but it

(Testimony of Dwight K. Grady.)

itself, is not a basis upon which any commitment is made by the government—by the vendor."

End of quotation. Would you prefer to note the changes, or [957] like me to do it?

Mr. Dinkelspiel: You seem eminently qualified, counsel.

Mr. Fruit: In the phase quoted,

"* * * we are guided by the form, which is a proposed contract, and if accepted by the government is executed by the government——"

the word "company" there in the original reading is edited on Mr. Dinkelspiel's to the word "government"——

"——and we receive the award."

Then skipping to the last six words of the passage as read, the phrase "by the government" has been stricken from the passage as read on Mr. Dinkelspiel's copy.

Mr. Dinkelspiel: Would you mind reading now the last few words so that it will make sense to His Honor?

Mr. Fruit: Yes, I'll read the last sentence.

"The announcement, the press release simply announces that negotiations will be entered into at some later date, usually embodied or specified therein, but it itself is not a basis upon which any commitment is made by the vendor." [958]

* * *

Q. Mr. Grady, you stated in response to one of my questions a few moments ago, if I may para-

(Testimony of Dwight K. Grady.)

phrase the question, that in addition to the press releases you relied upon the statements of department officials, Department of Agriculture officials, as evidencing the intention of the Department of Agriculture through the Commodity Credit Corporation not to buy more than 61,000 tons of raisins in the period here in suit?

Mr. Dinkelspiel: Now, if Your Honor please, I object to the question because of the use of the word "press release" in which counsel says, in his question, in addition to reliance upon the press release you relied on other things. Now, Mr. Grady said he didn't rely on the press release; he relied upon the announced program in addition to other things, and we object and will continue to object to any questions based upon reliance on a press release.

Mr. Fruit: May the answer——

Mr. Dinkelspiel: Not our case, counsel.

Mr. Fruit: Will the Court rule?

The Court: Yes; the question assumes facts established [960] in evidence which thus far have not been established, and I sustain the objection.

Mr. Fruit: May I have the answer read to which I refer? It was in reply to my question with respect to what else he relied upon, if anything, or something to that effect.

The Court: You might restate it, Mr. Fruit, save us reading back. The reporter——

Q. (By Mr. Fruit): Let me ask you this way——

The Court: We have a change of reporters.

(Testimony of Dwight K. Grady.)

Mr. Dinkelspiel: Counsel, the objection—the question would not be objectionable if he said in addition to the announcement of the secretary did you also rely upon something else.

Mr. Fruit: Well, I will accept that form of the question, if I may insert the phrase, the announcement of the secretary and the press release of September 5, because that's the only announcement, I believe, in evidence here.

The Court: Counsel, Mr. Grady is here for your cross-examination, and you pursue it any way you are advised.

Mr. Fruit: Yes, sir.

Q. (By Mr. Fruit): In addition to the announcement of the secretary made in the September 5, 1947, press release, already in evidence, did you rely upon any statements of the Department of Agriculture officials that there would be no changes in the program as announced? [961]

A. Yes, I did rely on such statements, including a wire from Mr. Smith to the effect that suggestions that we had made for a change could not be made because they were not provided for in the September 5 announcement, and that therefore the terms and conditions under which we would be invited to bid would be those terms and conditions.

Q. Mr. Grady, I hand you Plaintiff's Exhibit No. 8. Is that the wire from Mr. Smith to which you just referred?

A. (Witness reading document): Yes. I think this is the wire.

(Testimony of Dwight K. Grady.)

Q. Was that the only statement upon which you relied from the Department of Agriculture official?

A. No, we had statements from time to time from other members of the Department to the effect that they did not anticipate any changes in the program.

Q. Who, Mr. Grady, may I ask?

A. If I recall, Mr. E. A. Myer in Washington, and Mr. R. M. Walker in Berkeley, who is the—was later designated as the contracting officer.

Q. I am going to direct attention to pages 22 and 24, through 24 of the deposition of Mr. Grady taken in behalf of the defendants on August 13, 1953, beginning near the bottom of page 22.

"Question: Were there any other officials of the Department of Agriculture with whom you [962] talked about what the program as announced by the secretary was going to be?

"Mr. Dinkelspiel: You mean in advance of the program?

"Mr. Wolkinson: No, after the announcement.

"Question: You mentioned Graham. You mentioned Myer.

"Answer: If memory serves me right, I also talked to Dick—Richard Burke.

"Question: Is he the same man who sat on the Contract Disputes Board?

"Answer: Yes, sir, the same man.

"Question: What did you say to him and what did he say to you? And give us the date, if you will.

(Testimony of Dwight K. Grady.)

"Answer: Well, I can't give you the date. It was in that period.

"Question: Was it in September?

"Answer: Yes, it was in September. It was at the time I was talking with Mr. E. A. Myer and I talked with Mr. Burke. I think I also talked to Charlie Kunkel.

"Question: In the same month?

"Answer: Yes.

"Question: What was your conversation [963] with Mr. Richard Burke?

"Answer: As I recall it, I left a message with Mr. Burke to give to Mr. Myer.

"Question: Was this a long-distance conversation?

"Answer: Yes. It was long distance telephone.

"Question: What was the substance of it?

"Answer: The substance of my conversations and the reason——

"Question: No. With Burke.

"Answer: I can't recall the precise substance, but it was on the subject of stopping this deal.

"Question: Stopping the program as announced?

"Answer: Stopping the program after the first award had been made in order to appraise the effect on the raisin market and to determine then if the program should not be changed for the benefit of the producers. It was within that tenor that I was talking to Mr. Myer.

"Question: What did Mr. Myer say to you?

(Testimony of Dwight K. Grady.)

"Answer: He said that he had talked with the people in the Department and there was not very much likelihood that the program would be changed. He asked me what I thought about the government immediately coming out with an invitation to [964] bid on the second 30,000 in the first 61,000 that were set up, and asked me if it was not my opinion that a prompt invitation for bids would tend to stimulate a price buoyancy and therefore to result in higher priced bids coming in on this second half of the purchase. My answer to him, if anything at all, it would undoubtedly do the contrary, that the initial bidding established a lower level of prices for these raisins and that an immediate invitation to come out and buy some more in view of the insufficiency of the over-all purchase, that is, 61,000 ton, would set a target, and competitive bidders using that as a pattern would underbid the original bids. That was my judgment of the matter. His view seemed to be that a second large purchase—and 30,000 tons is a large purchase—would tend to bring supply and demand more nearly into balance and therefore to introduce some price buoyancy into the situation."

Q. You remember that testimony, Mr. Grady?

A. Yes, I do.

Q. Now, proceeding to page 37 and page 38 of the same deposition, beginning near the bottom of the page 37:

"Question: Was there any other official in the Department of Agriculture outside of Myer [965]

(Testimony of Dwight K. Grady.)

and Burke and Graham that you talked to about the secretary's announcement of the 5th?

"Answer: No. I think that by that time we had become completely convinced that there was going to be no change in the program and that therefore we might as well grin and bear it."

That is the end of that quotation. But proceeding to a point near the top of page 38:

"Question: But you will understand the point I am about to make. You just stated a conclusion and I want to get away from conclusions. I want to get into the facts. I am interested in knowing any official in the Department of Agriculture with whom you personally talked in September who gave you any facts which you can relate to us here concerning, one, what was this program that you are speaking about.

"Answer: The only direct advice that I recall was a wire from Mr. Smith in response to one of mine in which he said that the secretary had described in his announcement of September 5th what the program would be, and that there was no change contemplated, and that he expected Rosenberg and other packers to co-operate on this program.

"Question: That wire will speak for [966] itself. You went by that wire?

"Answer: That's right."

You remember that testimony?

A. Yes. [967]

* * *

(Testimony of Dwight K. Grady.)

Mr. Fruit: May I proceed with the portion of the transcript?

The Court: Yes.

Mr. Fruit: Beginning near the top of Page 93 of the transcript.

"The Chairman: You did state that you did obtain legal advice with respect to your position?

"Mr. Grady: That is right.

"The Chairman: And that delivery would not waive your rights to adjustment of prices?

"Mr. Grady: That is right. This right I discussed also with our counsel in San Francisco. In fact, our first discussion was right after October 14th, when I told him what had happened, and he then gave me the legal theory of the mitigation of loss, that it was the duty of the parties to a contract to mitigate the loss. [969]

"The Chairman: Did you discuss it with your counsel at or about the date of the telegram from the contracting officer?

"Mr. Grady: In that period, yes, because I was checking what my position would be with respect to delivery, to be sure I had the legal viewpoint. I understand a good bit about contracting procedure. I feel, not as a lawyer, but an arbitrary capacity. For years I have handled the arbitrations of the Industry."

That ends the quotes. I am finished with this witness—excuse me, may I ask one more question?

Q. (By Mr. Fruit): Do you remember that testimony, Mr. Grady?

(Testimony of Dwight K. Grady.)

A. As you refresh my mind of it by reading it, I do, yes.

Mr. Fruit: Thank you, that is all.

Redirect Examination

By Mr. Dinkelspiel:

Q. Mr. Grady, at that occasion you indicated that you had counsel at or about the time of the exchange of the Allmendinger telegram, that was in January of 1948 and previously you told counsel that you did not have counsel at that time, but had it only a couple of months previously. Do you wish to state which is your best recollection now, [970] please?

A. My best recollection is that immediately upon receiving word that the program would be changed, I discussed with counsel the position of the Company with respect to cancellation of the contract, requested cancellation or refusal to ship and so forth, and what my rights were, and at that time was given the advice that I followed consistently thereafter.

Q. And that is the testimony you wish to give, and is your recollection as to conference with counsel? A. That is right.

Q. Now, in the same type of reasoning let me show you Page 58 of your deposition conducted by Mr. Wolkinson, in which you referred to a $35.00 processing packing charge as being the basis upon which you reach $100 purchase price as against $150

(Testimony of Dwight K. Grady.)

sale price. You testified to counsel that the rough estimate of the difference was $40, and in your deposition you referred to $35.00. Do you wish to correct what may or may not be an inconsistency?

A. Well, I would say, sir, that the mathematics of the case as you may recall, there was rather turbulent discussion when this deposition was made. The mathematics of this case would support a $40 computation.

Q. By that you mean the difference between the $110 and the $151 referred to in this series of questions?

A. Yes. You see, you have questions of stemmers loss involved as well as the actual labor costs and so forth in [971] packing raisins and you use a round figure, talking in the broad sense, you would use the $40 figure. If you were talking inclusively about certain other costs not included in stemmer costs, you might use a different figure.

Q. And what is the difference to your knowledge that would be the proper difference in the time of the Government bid?

Mr. Fruit: I object, the question is improperly framed. It asks for the witness' conclusion as to what the proper factor would be. The question is what they actually used at that time, and that was the testimony in the record.

Mr. Dinkelspiel: I will accept that suggestion.

Q. (By Mr. Dinkelspiel): What actually did you use, what figure, Mr. Grady?

Mr. Fruit: May that be made more specific, if I

(Testimony of Dwight K. Grady.)

may interject? What did you use, at what time, and in what connection?

Mr. Dinkelspiel: In connection with the first Government bid, Mr. Grady, about which counsel has been questioning you. I think he understands the time and all of the points involved.

The Witness: Well, I think it ought to be clear that bidding is based upon competitive pricing. The calculations as to what you can pay for raisins in a natural condition unstemmed and subject to all of the handling and acquisition charges and so forth becomes a very casual rule of some procedure. [972]

Now, since there has been a long period of time, a lapse since 1947, I am forced to rely on memory and on a knowledge of the business for my answers in particular details of this kind.

I would say that based upon the situation as it has been reviewed here, that a rule of some differential would be about $40 a ton.

* * *

Q. (By Mr. Dinkelspiel): Mr. Grady, counsel has asked you numerous questions about a press release of September 5, 1947, and has asked you whether or not you relied on the press releases. I want to ask you one further question which is the same question, and I will ask you, did you or did you not rely upon the press release of September 5, 1947 in making a bid for Rosenberg Bros., and Co?

A. The answer is No, we did not rely on a press

(Testimony of Dwight K. Grady.)

release, which, as I understand it, is something that is published in the press. We relied on announcements received by us in the mail which confirmed the general information contained in the newspaper dispatches. [973]

It contained specifically the terms of the announcement, and that and other statements given to us by the Department tied the announcement in to our terms and conditions under which we bid.

Q. And so that we may be completely clear upon a subject which has been gone into and into time and again, the announcement which you refer to, was it Plaintiff's Exhibit No. 4?

A. Yes, this is the full text of the announcement.

Q. Mr. Grady, in response to a question propounded by counsel you stated that it was unusual to have gone short to the extent you did at the time that you bid the first Government contract. That was the substance of your testimony, was it not?

A. That is correct, yes.

Q. Would you explain that, please?

A. The Company never engaged in wide speculation of the kind that was required here. The bidding of very large tonnages at a time when no supply market had been established, when raisins were actually not in existence. They had just started to go down on the trays and had not been dried, none were ready for delivery, growers would not normally sell even if there had been no other conditions contributing to their reluctance to sell, and it would be a very brave person indeed who would bid

(Testimony of Dwight K. Grady.)

10,000 tons of merchandise in a short position, and that was one of the things that the company was objecting [974] to from the beginning announcement of the program. [975]

* * *

Q. (By Mr. Dinkelspiel): You were questioned by Mr. Wolkinson with respect to certain mimeographed notices to deliver, given by Mr. Laflin in Rosenberg Bros. Do you remember that?

A. I remember that I was questioned on the subject, yes.

Q. I have here, and I think probably later on, counsel and I may agree upon the introduction of the documents themselves. I am showing you what purports to be a series of mimeographed communications from the Chief, San Francisco Field Office, United States Department of Agriculture, addressed purportedly to Rosenberg Bros., and confirming a purported telephone conversation with Mr. Laflin. Do you recall whether or not you gave Mr. Laflin any instructions with respect to [976] those telephone conversations, assuming their existence?

A. I gave Mr. Laflin instructions at the time we first saw the cancellation that he was not to make deliveries of raisins under any instructions that he might receive.

Q. And that was the initial instructions and they were not specific instructions covering these particular——

(Testimony of Dwight K. Grady.)

A. No; I didn't see each of these individual documents, nor Mr. Laflin question me on each individual case. [977]

* * *

Mr. Dinkelspiel: I am advising counsel that I am now going to offer in evidence part of the 1947 Marketing California Grapes—Raisins issue of the Federal-State Market News Service, United States Department of Agriculture, Production and Marketing Administration, Fruit and Vegetable Branch, and California Department of Agriculture, Bureau of Market News, co-operating, issue of July, 1948, and so as not to burden the Court or the record with the entire document I will refer to parts thereof which I am offering in evidence. If counsel wishes to offer any other parts, of course there is no objection.

This is one of the documents permitted to be introduced [984] subject to objection as to relevancy by the stipulation between counsel.

* * *

Under the heading—the next paragraph, which is the fourth, "Market developments and prices":

"Prices received by California growers for 1947 crop raisins were sharply below the previous two years and averaged the lowest since the 1942 crop. Prices reflected the tone of the whole grape and grape products market set by the heavy crop of grapes, the large stocks and depressed prices of wine, the greatly reduced crush, the largest peace-

time production of raisins in history, restricted commercial export outlets and the excessive raisin supplies for commercial needs despite a minimum carryover from the 1946 crop. Commodity Credit Corporation bought more than 40 per cent of the crop in a surplus removal program. Raisin markets fluctuated, reflecting conditions or actions in connection with the [988] governmental purchase program."

Your Honor may recall we have had a little argument about whether this is a price support or governmental purchase program, and I call your attention to the nomenclature in this official publication, as a governmental purchase program.

"The general trend of prices was downward during the fall and early winter, steady until May and upward as grower marketing drew to a close in May and June."

The next, or fifth paragraph:

"Because of the excessive supplies, governmental help was solicited which culminated in buying by CCC of 116,000 tons of processed sun-dried Thompsons and 5,000 tons of Golden Bleached. Grower marketing was inextricably associated with the governmental purchase program. Various actions, interpretations and activities in connection with the purchase were responsible for an unsettled condition of the raisin market at many times, especially during the fall months. Contrary to industry request, the original CCC buying program provided no floor price, although a minimum grower level of $135 per ton was set on packer offerings to C C

after November 26. This minimum applied on the last two purchases or about one-third of the total. All CCC buying was on a [989] bid basis with acceptance restricted to lowest priced offerings.

"Originally the USDA"—which I take to be the United States Department of Agriculture—"announced September 5 that CCC would buy up to 61,000 tons of processed sun-dried Thompson seedless raisins. These were taken in two purchases, 30,000 tons September 24 and 31,000 tons October 13, at average prices of $154.47 and $146.37 per ton, respectively. Immediately after acceptance of the second block it was announced that CCC would buy another 60,000 tons of raisins from growers or others in physical possession of stocks at time of submitting bids. Growers were given an opportunity to sell unprocessed raisins direct to CCC, but all grower bids were above $135 per ton and were rejected November 26. In a companion purchase offer, 19,540.59 tons of processed raisins were taken, nearly all from packers, at an average of $171.46 per ton. At the same time CCC announced that in future purchases processors would be required to certify they had paid growers at least $135 per ton for natural condition raisins used in processing the amount offered to CCC. Another [990] 19,459.41 tons of sun-dried Thompsons were purchased December 22 at an average of $169.41 per ton. This brought total CCC purchases to 100,000 tons at prices averaging $158.19 per ton, but fell short of the announced 121,000 tons. Governmental buying

of sun-dried raisins was suspended at this point. Shipping instructions were forthcoming on only a very small tonnage of CCC raisins until near the end of January, 1948. Instructions on the remainder of the 100,000 tons came rapidly. Packing of these supplies was largely finished by the end of March and generally completed by mid-April."

Then I am passing a couple of paragraphs which I don't think are relevant, and going back to the raisin market through 1947 and January, 1948——

"The raisin market through 1947 and January, 1948, showed a continuation of the downward trend which set in at mid-November, 1946. The trend on the 1947 crop in this period, however, consisted of two phases. Bidding for new crop Thompsons opened shortly before first supplies were available with first buying principally for early fruit for early shipments. Prices to growers declined from the $140 opening quotation to a minimum of $110 early in October under the heavy [991] supplies still considered excessive despite the announced CCC purchase program of 61,000 tons. Packers in this period were largely buying on a hand-to-mouth basis and only as supplies were needed for getting out orders. Relatively small amounts were sold by growers at firm prices although moderate amounts were delivered to packers on open price contracts, largely under pressure of geting boxes for handling the crop.

The governmental announcement October 14 of the intended purchase of an additional 60,000 tons of Thompsons introduced the second phase and

changed the supply picture abruptly to make available quantities appear in line with minimum trade needs. Demand for grower crops increased sharply as packers sought to cover previous sales and accumulate stocks. Growers turned strong holders, partly under strong urging by grower groups and partly in expectation of selling direct to CCC at higher prices. Grower bid forms became available November 5 and a large tonnage offered to CCC was removed from possibility of packer purchase until rejection of both bids November 26. Between October 15 and November 5 there was very little trading between growers and packers although prices [992] had worked up to $135 per ton."

Your Honor will compare that with the announcement of $110 a ton on October 14.

"Sales by commercial packers to the distributing trade were largely stalemated in this period by inability to obtain supplies to offer. Moderate grower selling started November 5 at $135 and heavy sales were made the next two or three days when packer offers were jumped to $140. Growers also sold freely a few days later when packers offered $135 for a couple of days. Heavy sales at the $140 and $135 prices included both previously uncommitted lots and closing of a majority of the outstanding open price contracts.

"The change in the governmental program announced November 26 to require payment to growers of $135 per ton for raisins for future sale to CCC plus purchases by this agency November 26 as high as $175 for processed raisins put packers back

in the field market actively just after Thanksgiving at $135. Again heavy grower sales were made and again most packers quickly withdrew. From then until the end of January, 1948, the field market declined steadily, reaching a minimum of $100.

"Prices to growers turned upward at the [993] beginning of February following receipt by packers of shipping instructions on large tonnages of CCC raisins. In February and much of March the general range of prices to growers"——

Mr. Fruit: May I interrupt, Mr. Dinkelspiel? You are excluding sentences here and there, some of them——

Mr. Dinkelspiel: I generally explained—I didn't explain the last one, which I will. I tried to tell his Honor I left out a couple of paragraphs, the whole document is here, I did leave out this as irrelevant. Strike out the words, "prices to growers turned upward," from there on, and pick it up where I said: "From then until the end of January, 1948, the field market declined steadily, reaching a minimum of $100."

These sentences I left out as immaterial:

"Slow demand for packed raisins and a decline in their price, fairly heavy unsold stocks in grower hands and pressure from large packer inventories being held for shipment on CCC contracts contributed to the market weakness. At the end of January, it appeared that 75 to 80 per cent of the raisins for marketing through independent packers had been contracted by growers at definite prices."

And then we return to what I was reading:

"Prices to growers turned upward at the [994] beginning of February following receipt by packers of shipping instructions on large tonnages of CCC raisins. In February and much of March the general range of prices to growers to Thompsons was $110 to $120 per ton." [995]

* * *

The Court: Counsel, may I have your view with respect to the price support given in the amount $135 a ton, whether or not you resolve that as within the contemplation of the parties at the time the contracts were entered into?

Mr. Fruit: These two contracts?

The Court: Yes.

Mr. Fruit: No; it wasn't within the contemplation of [1056] the parties. It was a development which came later, much later, and was not either within nor prohibited by the terms of the contracts.

The Court: Do you regard that price support as frustrating in nature?

Mr. Fruit: Not substantially. It applied to about —I believe the announcement makes this clear— 20,000 tons of raisins which were acquired by the Government some time after a date in November. It seems to me, apart from anything else, I do think that other things are controlling, the Government should have expected or could reasonably have expected Rosenberg to have acquired the raisins to be delivered within periods beginning October 1, 1947, by that time. [1057]

At least, to have them under option or some other form of control. I would like to emphasize this fact. The decision to sell at all in this case was entirely Rosenberg's. Its decision to sell short was entirely Rosenberg's. Its decision not to take action to go out by options or other devices, whether it felt that it could or not, and control the quantities of raisins it was offering for sale to the Commodity Credit Corporation was entirely Rosenberg's.

If Rosenberg didn't want to contract with the government on the announced contractual terms at this time because it felt that the time was premature, or that the method of bidding announced was unsatisfactory, then it could have refused to submit offers. It could have submitted conditional offers, at least tried to protect itself.

The Court: Do you recall the testimony, I believe it was given earlier in the case by Mr. Grady, wherein he stated that he felt that Rosenberg' –I speak of Rosenberg's locally as the firm—had a duty to co-operate in view of the chaotic condition of the market, and that duty transcended even the economics of the case and the possibility of profits. Do you recall that testimony?

Mr. Fruit: I do.

The Court: How do you regard that testimony?

Mr. Fruit: Let me say this: I regard it as expressing a commendable sentiment. [1058]

Mr. Dinkelspiel: Well, that is kind of you.

Mr. Fruit: I may say this—this, I feel, is outside the realm of contract, but I expect to indicate that the officials in the government who had charge of

this operation, or, that is, who were connected with this operation who were experts in the field did not feel that bidding at this low level and on a short basis was co-operation. I will admit that Rosenberg was legally entitled to do it, but similarly the Commodity Credit Corporation was legally entitled later to buy more raisins and upon different bases.

Now, I suggest to you, and I do this in all earnestness, that a commendable sentiment to co-operate with the government is not a basis for contract or damage claims.

The Court: I have one further question. Do you believe that in the earlier stages of the negotiations that it was within the contemplation of the parties that the government would enter into contracts of purchase and sale for the raisins and other commodities with the grower, as distinguished from the processor?

Mr. Fruit: So far as I know, at that time it was not. It is commonly found, in a lot of programs by the government, much easier to deal with the packers in this case or in the meat subsidy field in which the government spent a billion and a half dollars during the war with the packers, much easier to deal with the first and most important distributors or [1059] processors rather than with the hundreds or even thousands of growers of either raisins or livestock. But that is a matter of convenience, and there was nothing in the contracts here which provided that the government could not later buy from growers. [1060]

* * *

CLINTON P. ANDERSON

a witness called on behalf of the Government, having been previously sworn, resumed the stand and testified further as follows:

Further Direct Examination

* * *

Q. (By Mr. Fruit): Senator, I hand you Plaintiff's Exhibit No. 4. Is that a copy of the announcement you made on September 4 or September 5, 1947, with respect to the proposed purchase of 133,000 tons of dried fruit by the Commodity Credit Corporation? A. Yes.

Q. Do you remember whether or not you issued that in the form of a press release?

A. No. I am sorry: I meant to say that I do recall whether I did or did not issue it in the form of a press release. It was issued to the newspapers at Albuquerque by Nathan Koenig, my Administrative Assistant who was in Albuquerque when I arrived there, and it was only a few sheets typed up which were handed to the newspapers.

Q. Thank you, Senator, that announcement contains the following language:

"Secretary of Agriculture Clinton P. Anderson announced that Commodity Credit Corporation will purchase up to 133,000 tons of dried apples, dried peaches, dried prunes and raisins, if the purchase of this total quantity of dried fruits is necessary to provide outlets for the relatively large 1947 production."

(Testimony of Clinton P. Anderson.)

Then skipping a sentence, it reads:

"The maximum limit of 133,000 tons is [1082] divided into purchase of 2,250 tons of dried apples, 3,750 tons of dried peaches, 61,000 tons of raisins, and 66,000 tons of dried prunes."

Will you tell the Court whether or not it was your purpose or intention by that language, or anything else in the announcement to make a contractual representation or warranty of any sort to anyone that the Commodity Credit Corporation would not buy in the future more than 61,000 tons of raisins in 1947?

Mr. Dinkelspiel: I object to that question, your Honor. It is obvious that the document must speak for itself, you cannot——

The Court: That question was posed in that form, or slightly different form by your predecessor, as I recall, and I ruled on that matter.

Mr. Dinkelspiel: Yes, that was the time I cited to your Honor that 20 Bishop's case and Hotchkiss vs.——

The Court: I can't recall the case, but I know I ruled on it.

Mr. Fruit: May I be heard briefly?

The Court: Certainly.

Mr. Fruit: While it is true certainly that testimony as to the intention of the parties will not be permitted to alter or vary language which is unequivocal, the witness may be asked his intention or purpose, if the language be [1083] equivocal. Certainly he may be asked if it was his intention

(Testimony of Clinton P. Anderson.)

to enter into any sort of a contractual arrangement.

We have two elements of uncertainty in this September 5, 1947, press release. We have the uncertainty of whether or not this was intended to be a contractual document. It isn't in form. The usual thing that we find in a contract—I recall no other case in which a press release was ever a part of a contract, in which it ever was used by a contracting party as a basis for creating contractual rights, presently or in the future. The ambiguity there, therefore, here, is what this is to the press release. Now, that ordinarily would be enough to dispose of the question, but the plaintiff has said we find in this some sort of an antecedent contractual intention. There is certainly enough of an ambiguity for the witness' testimony to be permitted.

Mr. Dinkelspiel: Your Honor——

Mr. Fruit: Now, the second ambiguity is: This is that the Commodity Credit Corporation will purchase up to 133,000 tons of certain dried fruits. It doesn't say it won't purchase any more. It says at this time it will purchase this much. Now, that is not unequivocal language of a promise, intention, or anything else, or even to support the plaintiff's contention that it says impliedly that there would be no more purchases. All it says there will be this many purchases. [1084]

Mr. Dinkelspiel: Your Honor please, I think counsel, with all respect to his standing and ability, has confused the issue of ambiguity here. This wit-

(Testimony of Clinton P. Anderson.)

ness is asked whether he intended by this to do something. The authorities are clear, your Honor, that uncommunicated intent has no bearing whatsoever and can't possibly be used as a basis of knocking out any contractual relationship which may exist from the language of the document itself.

Now, the gentleman here is an outstanding public citizen, he was the Secretary of Agriculture, this release was prepared for him, he looked it over, he authorized its release. He must stand on its words, your Honor. He cannot say, "I intended something different than is said therein," or, "I intended these words to mean such and so." Authorities are clear, your Honor, you cannot permit evidence of uncommunicated intent to be used to affect adversely the words used. And I stand on the objection, your Honor.

The Court: In the form the question is presented, the objection is sustained.

Mr. Fruit: May I make an offer of proof, sir?

The Court: Yes.

Mr. Fruit: I happen to know the Senator's answer on that point; will it be sufficient if I indicate it?

Q. (By Mr. Fruit): I believe, Senator, that you would answer that it was not your intention to make a contractual [1085] warranty or representation by the language I have quoted to anyone, is that correct? A. (Witness nodding.)

Mr. Dinkelspiel: Well, your Honor, I don't know what an offer of proof is exactly when counsel asks

(Testimony of Clinton P. Anderson.)

the witness to state what his testimony is going to be. I think an offer of proof is that you intend to prove by the witness the following.

The Court: I take it that counsel——

Mr. Fruit: I will state it in the form that counsel wishes it.

Mr. Dinkelspiel: Well, your Honor——

Mr. Fruit: I intend to prove by the question and answer that the Senator did not intend this document to be any part of a contract at any time, and that he did not intend to represent by the language I quoted at that time and place or at any time that the Commodity Credit Corporation would not buy in 1947 more than 61,000 tons of raisins beginning on and after September 5, 1947.

Mr. Dinkelspiel: May I ask counsel if he intends further to prove that the Senator communicated his intentions otherwise than through the announcement, which Exhibit 4, to the plaintiff in this case?

Mr. Fruit: Yes; I intend to do so.

Mr. Dinkelspiel: You intend to do so? That the Senator [1086] communicated it?

Mr. Fruit: No; that he did not communicate it. [1087]

* * *

Q. Senator, so far as you know, please tell the Court whether the September 5, 1947, press release, plaintiff's Exhibit No. 4, was reviewed by the Solicitor of the Department of Agriculture or anyone of its staff before the issuance of the release?

A. It was not. [1088]

* * *

(Testimony of Clinton P. Anderson.)

Q. Did you or did you not at any time on or after September 5, 1947, tell anyone, so far as you recall, that Commodity Credit Corporation would not buy more than 61,000 tons of raisins in the period beginning September 5, 1947?

Mr. Dinkelspiel: Object to the question, incompetent, irrelevant and immaterial. There is no charge been made as to what he told anybody. We don't rely upon what he said.

The Court: Objection overruled.

A. I did not.

Q. (By Mr. Fruit): Did you authorize anyone to make any such representation on your behalf?

Mr. Dinkelspiel: Same objection, your Honor.

The Court: Overruled.

A. I did not.

Q. (By Mr. Fruit): Did you or did you not know, prior to the close of business on October 14, 1947, that Rosenberg Bros. or anyone else had sold short in its sales of raisins to the government in the program announced on September 5, 1947?

A. I did not.

The Court: What was the date, counsel?

Mr. Fruit: The dates were between September 5, 1947, and [1090] the close of business on October 14th, 1947.

Mr. Dinkelspiel: Let me have the question read, please.

(Question read by reporter.)

Mr. Dinkelspiel: Your question is directed to his personal knowledge in that period, is it not?

(Testimony of Clinton P. Anderson.)

Mr. Fruit: Yes, it is, sir.

Q. Did you or did you not, in October, 1947, revoke or veto any right or action by the Commodity Credit Corporation to increase the corporation's purchases or raisins beyond the stated 61,000-ton limit? A. I did not.

Q. Did you or did you not anticipate, either at the time of the issuance of the press release on September 5, 1947, or at any time prior to October 14, 1947, that Rosenberg or anyone else would sell raisins short to the government under the program announced on September 5, 1947?

A. I did not.

Q. Senator, I hand you Plaintiff's Exhibit No. 17 constituting a telegram to you dated October 14, 1947, signed "Rosenberg Bros. & Co." Did you or did you not, as you recall, see that telegram before the close of business on October 14, 1947?

A. I did not.

Q. Do you recall when you did see that telegram for the first time?

A. I was out of town on October 14. I returned to Washington [1091] the evening of October 14, late, and I didn't get to the office until the next day. I got into town 9:30 or 10:00 o'clock in the evening of the 14th, and on my arrival in the office on October 15th, it was brought to me by Nathan Koenig, administrative assistant.

Q. Similarly, I hand you Plaintiff's Exhibit No. 18, a telegram to you dated October 15th, 1947, signed "Rosenberg Bros. & Co.," in which they sup-

(Testimony of Clinton P. Anderson.)

plemented their wire which you have just seen. Needless to say, you did not see that wire at any time prior to October 15th, 1947, is that correct?

A. No; I did not see it prior to October 15th, and I did not see it simultaneously with the wire of October 14th. It was brought to me subsequent.

Q. Senator, when you saw those wires, what did you do about them, if you recall?

A. I referred them to the Fruit and Vegetable Branch for a report and recommendation. I also asked Mr. Koenig to circulate them, if they had not previously done so, to the Legal Department.

* * *

Q. (By Mr. Fruit): Senator, will you please tell the Court why you did not grant the cancellation request made in those two telegrams? [1092]

A. Well, it was more than a single reason. In the first, please, whatever bid Rosenberg Bros. had submitted, it had submitted voluntarily——

* * *

The Witness: May I say, your Honor, that I sat in this court room and heard the statement made that that was a question that couldn't be answered, and it can be answered, and I am trying to answer it.

This was an ordinary business transaction. These people had bid—— [1093]

* * *

The Witness: The general accounting office had finished a long and exhausting study of the opera-

(Testimony of Clinton P. Anderson.)

tions of the Food Administration [1094] which had been merged with the Department of Agriculture. We had been in a very bitter discussion over that, and I had talked to Mr. Frank Weitzel, I think, who has just been made the controller of the general accounting office, protesting vigorously because he had claimed that people, prior to my administration, were unable to account for $300,000,000 worth of sales to the armed forces and it had been brought home to me very vigorously that a person must be able to account properly for the transactions which Commodity Corporation had had. It had handled, not just hundreds of millions, but billions of dollars worth of commodities and the argument with Mr. Weitzel was red hot at the time.

Therefore, I knew that whatever I did would have the earnest scrutiny of the Controller General of the United States because of the personal troubles that had developed out of my characterizations of their so-called audit of the Commodity Credit operations, and I was trying to be very sure that what I did with this contract would not subject me to criticism from the general accounting office because of its cancellation.

I was advised at that time by our legal division, by Mr. Schulman first and then by Judge Carol Hunter, who was the General Solicitor and whom I called in to confer with Mr. Schulman, who told me that I must not cancel a contract unless I could show it was to the financial advantage of the government to cancel it, and in that particular case they had [1095]

(Testimony of Clinton P. Anderson.)

warned me that since the object was to obtain higher bids, not lower bids, had I cancelled the contract it would not have been to the financial advantage of the United States, but to its financial disadvantage and therefore my cancellation would have been completely improper.

I think that was the strongest reason why the contract was not cancelled, the definite knowledge that the people who were then engaged in auditing the Department of Agriculture and every one of its operations would immediately pounce upon the cancellation as an evidence of improper conduct, and I would not have cancelled it because I had engaged lawyers to advise me on it, and I took the advice of those lawyers.

Wholly apart from that, as a business proposition, I would not cancel it, because I felt that a free bid had been made and that those people must abide by that bid. In the first place, it needs to be remembered that the Rosenberg bid was the lowest of all bids.

It would have been quite possible for me to have rejected a bid that was close to the upper limit, because I could have substituted for it a number of other bids.

Sunmaid raisins alone had bid on enough to fulfill the entire order or the entire application that we made, and if I had rejected or refused or cancelled the bid at the upper scale I may have been able to somehow justify my action in [1096] doing so.

(Testimony of Clinton P. Anderson.)

But to cancel the lowest bid was to me entirely improper and absolutely wrong, and I could not do it. [1097]

* * *

The Witness (Continuing): Finally we felt that no cancellation should be effected to one Company without taking all companies and that would seem to me to be almost an entirely new program. We had been working on a program since August, we had made an announcement in September, the Department had been receiving bids, and to start cancelling would have drawn the whole thing, I thought, back into a new program.

But the last answer came from the Board, the Commodity [1100] Credit Corporation itself, where the revised program was presented to it on October 27, and the Board voted that it would not change the program.

Therefore, that seemed to completely dispose of the question of cancellation of contracts.

Q. Senator, did you—I beg your pardon.

Mr. Dinkelspiel: Could I interrupt just a moment, Counsel? Is that revised program part of the docket?

Mr. Fruit: I don't believe it is. This would have been a proposed change in the program which was not adopted. It involved, as I understand it, from the Senator's answer, the possibility of cancellation of the contracts.

Mr. Dinkelspiel: All right.

Q. (By Mr. Fruit): Senator, I hand you Plain-

(Testimony of Clinton P. Anderson.)

tiff's Exhibit No. 21, a telegram dated October 31—rather a copy of a telegram dated October 31, 1947, from Mr. Dwight K. Grady, Assistant to the President of Rosenberg Bros. & Co. to you. Do you remember seeing that telegram on or about, or shortly after October 31, 1947? A. Yes.

Q. What did you do when you received that telegram?

A. Asked the Fruit and Vegetable Branch for a recommendation for an answer.

Q. Did you receive their recommendation for an answer? A. Yes, I did. [1101]

Q. What did you do with it, or what was done with it, if you know?

A. Sent in the form of a message to Mr. Grady on November 6th.

Q. I hand you Plaintiff's Exhibit No. 23. Is that a copy of the message which was sent to Mr. Grady? A. Yes.

Q. That message reads, in pertinent part:

"Thanks your tel relativ raisin purchase program. Objective of this program is and has been to remove raisin surplus and permit remainder of supply flow in normal commercial trade channels at prices established by the industry. Announcement of offer forms for use of producers and others in making offers on additional 60,000 tons now being distributed. Believe it advisable await return of offers before determining whether purchase program should be changed. Unable grant your request for cancellation of raisin purchase contracts be-

(Testimony of Clinton P. Anderson.)

tween your firm and Commodity Credit Corporation.

Senator, did you or did you not at any time in the month of October, 1947, or at any time during 1947, receive a telephone call or any other communication from the President or the White House concerning the purchase of raisins in addition to those referred to in the September 5, 1947, [1102] press release? A. I did not.

Q. Do you remember receiving and seeing Mr. Dwight Grady in your office in Washington on or about November 19, 1947? A. Yes.

Q. Will you please tell the Court your recollection of your conversation with Mr. Grady at that time?

A. Well, Mr. Grady came into the office and discussed, first of all, the fact that a newspaper article had appeared saying that I had said the packers had ganged up on the growers. Mr. Grady testified some days ago that the controversy was that the newspaper story had said the packers had ganged up on me. That was not it at all. The statement was that I had said the packers had ganged up on the growers. And he asked me if I made that statement, and I told him that I had, that I believed it to be true, and we discussed it for awhile.

He then asked me if something with reference to another statement that I had made. I am not certain whether that had to do with whether, whether I was going to teach the packers a lesson, but I

(Testimony of Clinton P. Anderson.)

think that was the other item that he brought up, and I told him that there were all kinds of ways in the world of teaching lessons, that I wasn't trying to teach anybody a lesson, but I had been trying steadily in the program to show that by cooperation with the Government [1103] and the Industry we could remove a surplus in a locally centered business, like the grape industry and the raisin industry.

Then we went to his long telegram of October 31, and took it pretty much paragraph by paragraph. I had a copy of it in front of me, and I could take a copy of it now and go through it paragraph by paragraph, dealing with the subjects——

Mr. Fruit: Just a moment, please.

I hand you Plaintiff's Exhibit No. 21, which is a copy of the wire in question.

The Witness (Continued): We had some questions about the press announcement of September 5, so I will omit the conversations I had on that subject.

Mr. Dinkelspiel: I am sorry, I didn't understand the Secretary's answer, I didn't hear it.

The Witness (Continuing): I said we have had some question of over the announcement of September 5, so I didn't intend to discuss the matter of that announcement of September 5. I have been prohibited from answering on it, and I don't think I should bring it in here unless you direct me to do so, but I——

(Testimony of Clinton P. Anderson.)

The Court: What is your specific reference, Senator, in this matter?

The Witness: Mr. Grady's telegram said:

"I should like to enumerate, for the sake [1104] of brevity, what I think of the facts. No. 1, your announcement of September 5 was received by the entire Industry and the distributing and consuming trade of the Country as an outline of the 1947 raisin program."

The Court: What is your comment on that, Senator?

The Witness: Oh, my comment is it was not.

The Court: All right.

The Witness (Continuing): And the second point was contemplated removal of 61,000 tons of raisins from a surplus aggregating at least 100,000 tons.

I reminded Mr. Grady that he and I were both present in San Francisco when there were estimates ranging as high as 100,000 tons of probable surplus, so that I was just as familiar with a hundred thousand tons as he was, there wasn't any question of trying to remove it by 61,000 tons.

Mr. Dinkelspiel: Pardon me, sir, just a moment, if Counsel will permit me, and your Honor, his comment on Item No. 1, you said, "It was not." It might save cross-examination if the witness would say "not what."

The Witness: It was not received by the entire Industry and the distributing and consuming trade as an outline of the 1947 raisin program.

(Testimony of Clinton P. Anderson.)

(Remark by Mr. Dinkelspiel inaudible to the Reporter.)

The Witness (Continuing): Item 5, he said that radio [1105] and press protests resounded through the San Joaquin Valley. Thirteen packers indignant at losing the business wired Washington officials protesting that the original bids had been voided by lapse in original conditions of bidding, and I pointed out to him, if that was so, and I was sure that it was, and knew that it was then it indicated this was a pretty good business and Rosenberg Bros. weren't being harmed by being allowed to fulfill the contract that other people were ready and willing to fulfill.

Mr. Dinkelspiel: I don't see the reference on this point, your Honor.

The Witness: I am reading from Item 5 on Page 2 of the telegram as I have a copy of it here.

The Witness (Continuing): Then in Item 6, the telegram read:

"In the meantime, additional bids were invited and tendered. The action of the thirteen packers in protesting original bids was in effect the serving of notice on all packers that bidding on the second invitation would be lower than on the first."

I agreed with him on that, but I also pointed out *pointed out* that on the first bidding his firm had led the procession of downward prices.

Then we came to the paragraph that I now read as follows:

"However, immediately upon issuance of [1106]

(Testimony of Clinton P. Anderson.)

the September 5 announcement officials in the Department were advised that in the judgment of the Industry the application of competitive bidding would result in depressing the raisin market and in the case of commercial processors, would require them to sell raisins short, since they had not been able to purchase at firm prices sufficient raisins to fulfill any commitments made."

We had a long discussion on that question, and I took the position that I felt before they had bid they should have auctions on the raisins and if not that, they should have immediately gone out and purchased raisins, they must have known what they could buy them for or they would not have bid.

Then there was an item in here which said:

"In fact, the writer was advised of the program as announced as a substantial contribution toward stabilized conditions within the industry and said they were told the Department solicited and expected to receive our cooperation in making the program a success."

He had a telegram from one of the people in the Department using words of that nature.

Then we came to a paragraph which said:

"Going direct to producers and others [1107] having possession to purchase a supplementary 60,000 tons simply means that the processors in short position as a result of this program would be unable to cover their shorts without extensive and serious financial losses."

Well, I couldn't let that go by without saying

(Testimony of Clinton P. Anderson.)

that I didn't understand what shorts were doing in this market, that I couldn't believe that they had submitted bids running into thousands and thousands of dollars without knowing where they were going to get the raisins, and Mr. Grady informed me at that time that not only were they completely short at the time the bid was offered on their Government raisins, but also were short on domestic trade, that that was a practice which they had of establishing the market later.

I confessed my inability to understand why, because they had guessed the market wrong, he felt we were in any way obligated to worry about his problem.

He then went on to say:

"I am informed by a group, by an attorney representing a group of processors, that some of them will be forced into bankruptcy as a result of this program."

I asked him the name of one firm that had gone into bankruptcy or was threatening to go into bankruptcy. He was not able to do it. He said there would be firms going into [1108] bankruptcy. I said let me know if they go into bankruptcy, I would be interested in that.

He said the commercial market is at virtual standstill in the telegram. I asked him if that was true. Sunmaid and Cal-Pak were certainly in the market, it wasn't at a virtual standstill, and was it not true that he was selling raisins every day. His answer was that he was selling raisins, but he wasn't buying raisins.

(Testimony of Clinton P. Anderson.)

Then we got into the question of the cooperative in the Industry, and he said—the telegrams, I read him this section, the cooperative in the Industry is continuing to sell raisins at prices below replacement costs in the field and is able to do so because it receives its tonnage against membership contracts. Thus in effect it was appropriating trade normally moving through commercial operators as well as filling up its own normal trade pipelines.

I said, do you mean Sunmaid?

And he said, "Yes."

Well, I said I think Sunmaid is doing a fine job. I commend Sunmaid for participating in the program. I pointed out that Sunmaid had offered to supply us the entire 30,000 tons in the first purchase. I asked him what was wrong with that sort of an operation. He was not happy with Sunmaid, not happy with what Sunmaid was doing, very critical with the way they were handling the [1109] program.

I said we were very happy with the way they were handling the program. They had gone into the program and tried to remove surplus raisins from the market and that we were not in a position to criticize them for so doing.

Then comes offer of cancellation:

"On October 14 my Company wired you requesting cancellation and supplemented this with a wire offering to cancel all its growers' contracts at firm prices below $140 a ton."

(Testimony of Clinton P. Anderson.)

I asked him if that meant all their contracts or just the Government contracts.

He said you sold tremendous quantities of raisins at fixed prices; do I now understand you are willing to cancel all the contracts with your growers that are below $140 a ton?

He said on the Government's business.

I said, "How in the world can you run that kind of a program with one set of prices for Government business and one set of prices for private business," where raisins were mixed where you couldn't tell whose raisins were going to be delivered to the Government. "How can you decide who got the $140 raisins and who got the $110?"

Mr. Dinkelspiel: All part of your conversation?

The Witness: Yes. No possibility of an answer from him on it. [1110]

Mr. Dinkelspiel: I beg your pardon?

The Witness: No possibility of an answer from him on it. He couldn't explain——

Mr. Dinkelspiel: If your Honor please, ask the Senator's voluntary contribution to his testimony, "no possibility of an answer" go out.

The Court: Senator, there was no answer made?

The Witness: No answer made.

Mr. Dinkelspiel: I trust he will be admonished, your Honor, not to characterize the nature of his conversation, too.

The Witness: I am sorry——

(Testimony of Clinton P. Anderson.)

Mr. Dinkelspiel: Or what Mr. Grady had to say.

The Witness: Well, I want to hear—am I allowed to hear what he said?

The Court: Yes.

Mr. Dinkelspiel: I suggest you not characterize the manner or nature of Mr. Grady's conversation with you in such manner as to say "no possibility of a reply" which obviously is only your conclusion, Senator.

The Witness: Well, now, I will say he sat mute.

Mr. Dinkelspiel: I suggest you confine yourself to testimony.

The Witness: Well, it is testimony.

The Court: Senator, may we retrace our steps on this [1111] last statement. Would you read that—I was interrupted—would read that statement made by the Senator?

(Record read by the Reporter.)

The Court: That part of the answer with respect to "no possibility" may go out and the balance may stand.

Mr. Dinkelspiel: "He couldn't explain" that is part of the motion.

The Court: I think the record is clear, Counsel.

The Witness (Continuing): We continued our discussion of the problem that there had been in the raisin Industry. I didn't attempt to say there weren't problems, I acknowledged that there were, and I did, however, tell Mr. Grady that I had spent

(Testimony of Clinton P. Anderson.)

considerable amount of time on the problem, that we were not receiving objections from other firms, that Sunmaid was delivering raisins, that other firms were bidding and preparing to deliver raisins, but he seemed to have a specialized problem because of his short position, both domestically and on his Government contracts, and that therefore I wished, if he would, in the future he would take these matters up with Mr. Gilmore of the Commodity Credit Corporation.

Q. (By Mr. Fruit): Did Mr. Grady ask you anything about increasing the prices of raisins under his Company's contracts?

A. Yes, he suggested that that would be the best way to get out of the situation. [1112]

Q. Do you remember what you told him?

A. Well, I——

Q. What you said to him?

A. I could only say to him what I did say, that was the best way from the Company, but not the best way from the standpoint of the Government.

Q. Do you remember receiving a telephone call in Washington, D. C., on December 4th, 1947, from Mr. Grady? A. Yes, I do.

Q. About what time was that? About what time of the day?

A. Came in late evening after most of the day's work was over, about seven o'clock in the evening.

Q. Senator, I hand you Plaintiff's Exhibit 27, a copy of the notes of Mr. Dwight Grady in evide[illegible]

(Testimony of Clinton P. Anderson.)

in this case, of that conversation. Will you read the memorandum, please?

A. I have seen this before.

Q. Will you tell the Court whether that confirms with your recollection of the conversation?

A. It does not.

The Court: May I see that, please?

Mr. Fruit: Oh, certainly.

Q. (By Mr. Fruit): Will you tell the Court your recollection of your conversation with Mr. Grady at that time?

A. Well, I have with me the notes made by the girl who was handling the telephone conversations and her transcript [1113] of those notes which I would prefer to refer to.

Q. Will you show them to us, please?

Mr. Dinkelspiel: Your Honor please, may I interrogate the witness on the reference?

Q. (By Mr. Dinkelspiel): What are you referring to, Mr. Senator?

The Witness: We had a habit of girls in the office making transcripts of conversations. There were six girls who handled the general telephone conversations to the Secretary's office. There were two girls who were supposed to handle most of the conversations which the Secretary himself engaged in. And one of those girls had a recording machine which recorded the conversations.

Mr. Dinkelspiel: I suppose you told Mr. Grady it was being recorded, didn't you?

Mr. Fruit: He hasn't said——

(Testimony of Clinton P. Anderson.)

The Witness: If you will permit me to finish.

Mr. Dinkelspiel: Go ahead.

The Witness: That girl who handled the recording device was not present on this occasion and therefore there was no recorded record of the voices.

The girls who took the conversation at seven o'clock in the evening had been there all day long, had other obligations at the same time, was making as good notes as she could of the conversation, but the notes are not complete, [1114] they are not conclusive, they are merely what she took down at the time of the conversation.

Mr. Dinkelspiel: When were they written up, Senator?

The Witness: Immediately thereafter.

Mr. Dinkelspiel: I mean, you are stating that from your positive knowledge?

The Witness: This transcription was made at a time when I was preparing to come out here to testify.

Mr. Dinkelspiel: That was when?

The Witness: Not more than two months ago.

Mr. Dinkelspiel: Yes. Your Honor, obviously this record is not one that can be used for the purpose of refreshing this witness' recollection in any form whatsoever. It is a memorandum prepared for the purpose of testifying in the trial, not for refreshing his recollection.

Mr. Fruit: Your Honor, I was beginning to lay the foundation for these notes when Mr. Dinkelspiel took over my witness. I would like to develop the

(Testimony of Clinton P. Anderson.)

story a point or two beyond Mr. Dinkelspiel's examination.

The Court: You may proceed.

Q. (By Mr. Fruit): Do you have a copy of the original stenographic notes as taken by the girl with you?

A. I have a photostat of the original stenographic notes I do not have the original stenographic notes. I anticipated that she might be subpoenaed and I thought it would be better [1115] if she brought her own notes.

Q. Is the transcription to which you referred in answer to Mr. Dinkelspiel's question, a transcription of those notes? A. Yes.

Q. The original notes? A. Yes.

Q. As evidenced by the photostat which you have? A. Yes.

Q. May I see the original notes and the transcription both please? Like to show them to opposing counsel.

Mr. Dinkelspiel: These notes have never been shown to us.

Mr. Fruit: So far as I know.

Mr. Dinkelspiel: No, the transcription of the Senator's testimony.

Mr. Fruit: So far as I know.

Mr. Dinkelspiel: I charge that, your Honor, with a breach of the stipulation into which we entered into this trial, which was the exchange of all documents relating to matters of evidence that was

(Testimony of Clinton P. Anderson.)

going to be produced. Counsel, if you want to go back on that, you can.

Mr. Fruit: Well, Mr. Dinkelspiel, of course, the first time I saw, or to the best of my recollection even knew about these documents was when the Senator came to Washington for [1116] the first time this week. Now, they are the Senator's documents. At this point they are not the Government's. They are not, so far as I know, in any files that I have or have access to. I don't feel that I can be charged with a breach of the stipulation.

Mr. Dinkelspiel: Your Honor, please, let's stop the argument, the difference between the Senator's notes and Mr. Grady's are so microscopic, I don't see what we are talking about.

Mr. Fruit: That is why I gave you a copy.

Mr. Dinkelspiel: I couldn't read these.

Mr. Fruit: It was not why I gave you a copy of them, but I wanted you to see the transcription.

Mr. Dinkelspiel: If we had a copy sooner we would have saved five minutes.

Mr. Fruit: I think there are differences, but they will speak for themselves if they are put in evidence.

Q. (By Mr. Fruit): Do you have copies of these, a copy of that for yourself?

The Witness: Yes, I do.

Mr. Fruit: May I have these marked?

Mr. Dinkelspiel: May we have a copy?

Q. (By Mr. Fruit): How many sets of copies do you have? A. I am sure I have——

(Testimony of Clinton P. Anderson.)

Mr. Fruit: May we supply you with [1117] copies——

Mr. Dinkelspiel: Later.

Mr. Fruit: Later.

Mr. Dinkelspiel: Before we cross-examine?

The Clerk: Defendant's Exhibits F and G for Identification only.

The Court: So ordered.

Mr. Dinkelspiel: Which is which, please, Mr. Clerk?

The Clerk: The stenographic notes are marked G, and the copy of it F. [1118]

Mr. Dinkelspiel: Just so we may conclude on this subject, may I ask counsel whether he or the Secretary are certifying that the stenographic notes have been transcribed into the typwritten notes, because I don't think any of us here capable of transcribing them, whether it was transcribed by the Secretary or Senator Anderson.

Mr. Fruit: Defendant's Exhibit F for Identification bears at the bottom of it a sworn statement:

"This will certify that the above is a transcription of notes taken by me of a telephone conversation between Secretary Anderson and Dwight Grady on December 4, 1947."

(Thereupon documents referred to above were marked Defendant's Exhibits F and G for Identification.)

Q. (By Mr. Fruit): Senator, do these notes

(Testimony of Clinton P. Anderson.)

represent the full conversation? Do they report the full conversation between you and Mr. Grady?

A. No, I tried to say that in the beginning, that this was done by a secretary who had been working since nine o'clock in the morning, and at the end of the day it was difficult to keep track of calls and long distance calls. Other members of the staff had gone, and she didn't take the notes word for word as the other girls would have been required to had they been present. The notes themselves are not clear and [1119] conclusive.

Q. Senator, apart from these notes, do you have an independent recollection of any additional conversation at that time between you and Mr. Grady not incorporated in the notes?

A. No, I think that the only point that was in here was that I had tried to state to him that if there was a reason for negotiation, if there was any reason that this matter should be taken up and handled; that I was not opposed to that program, but that it had to be decided by the folks in the Commodity Credit Corporation and by the Legal Division and I was not going to attempt to pass on legal problems connected with it.

I finally suggested that maybe a lawsuit would be better than an attempt at renegotiation. I know of nothing else in connection with that, that I could add.

Mr. Fruit: I offer Defendant's Exhibit F for Identification and G for Identification in evidence.

Q. (By Mr. Fruit): Senator, Mr. Grady's notes

(Testimony of Clinton P. Anderson.)

of his telephone conversation with you on December 4th, 1947, Plaintiff's Exhibit 27 contains a statement attributed to you.

"We can work out a pattern for adjustment that will not give you a profit, but will not cause you a loss."

"Do you remember making such a statement?

A. No. I have said and did say, and said to him at that time that I was not interested in trying to buy these raisins on a basis that was going to cause people to take losses. I was not interested in trying to make them profits, but that the Government was not in the business of trying to destroy its own people. [1121]

* * *

Cross-Examination

By Mr. Dinkelspiel:

Q. Senator, as part of your duties as Secretary of Agriculture, you had some position, did you not in the Commodity Credit Corporation?

A. I was Chairman of the Board.

Q. You were Chairman of the Board. Who were the administrators of the Commodity Credit Corporation?

A. Generally speaking, Jess Gilmer is president, and Frank Wooley and Ralph Trigg.

Q. They were admistrators?

(Testimony of Clinton P. Anderson.)

A. Yes, regardless of their titles, those three men——

Q. And what is an administrator? What did he do?

A. Well, he was supposed to carry out the programs laid out by the dockets of the Commodity Credit Corporation.

Q. And in turn was supposed—and in turn was responsible to you as Secretary of Agriculture?

A. Yes.

Q. The programs that were put into effect and referred to here, for example, the one announced on September 5, was that a Commodity Credit Corporation program?

A. No, that was a price support——

Mr. Fruit: I object to that. May I express objection there? I think the program is characterized as having been announced on September 5. That is a matter about which there [1129] may be some dispute.

Mr. Dinkelspiel: Well, the program that is referred to in the announcement of September 5, and which has permeated almost every question in this court room, that program, was that a Commodity Credit Corporation program?

A. Well, it was a price support operation which the Department of Agriculture was required to carry out. It carried it out through the mechanism of the Commodity Credit Corporation.

Q. Carried it out through the mechanism of the

(Testimony of Clinton P. Anderson.)

Commodity Credit Corporation. And the final responsibility for that program was yours, was it, as Secretary of Agriculture?

A. Well, the final responsibility was probably with the president of the Commodity Credit Corporation, that he was Jess Gilmer, and at the time the members of the board of the Commodity Credit Corporation were nominated to those positions by the Secretary of Agriculture and were employees of the Department of Agriculture or the Commodity Credit Corporation.

Q. Well, it so happened, did it not, that you, the Secretary of Agriculture, made the announcement of programs, these so-called press releases that counsel has been calling to your attention came from the mouth of the Secretary of Agriculture, did it not?

A. No. Generally speaking, all the announcements were made by the Commodity Credit Corporation of the Department of Agriculture, but in this particular instance Mr. Gilmer and [1130] Mr. Trigg and Nathan Koenig had come to Albuquerque and had met me there, and it was their opinion that the so-called press release should be edited, and they did edit it and did scratch out the words "The Department of Agriculture" and put my name in it, because they said while I was temporarily in Albuquerque, the Department of Agriculture was [illegible] and that the announcement should be headed with my name rather than with the Department of Agriculture.

(Testimony of Clinton P. Anderson.)

Subsequent programs were under the name of the Department of Agriculture. [1131]

* * *

Q. (By Mr. Dinkelspiel): Senator, you say you cannot answer this question as to whether these programs did not emanate from the Department of Agriculture and carried out through the Commodity Credit Corporation. That, I understand, was your last answer?

A. Generally speaking, that answer would be true, but in many instances the Commodity Credit Corporation permitted the program to emanate and the Congress of the United States has specifically now removed the Commodity Credit Corporation from under the exclusive jurisdiction of the Secretary of Agriculture.

Q. Well now, we are not talking about the present day, Senator. We are asking you to confine your remarks at the moment to this program which started with the announcement of September 5. You have already identified the fact that you, as Secretary of Agriculture, announced that Commodity Credit Corporation was intended to carry out this program; that is correct, is it not?

A. That is right.

Q. And instead of Department of Agriculture you were doing this as Secretary because you were in Albuquerque, not in Washington at the time?

A. That is correct.

Q. Now, if you will look at Plaintiff's Exhibit No. 9, it is true, is it not, that that states that "The United States Department of Agriculture, through

(Testimony of Clinton P. Anderson.)

the Commodity Credit Corporation, is now calling for bids."? [1134]

A. You will have to help me find that. I don't find that in here.

Q. In the first paragraph.

A. It says that the Department of Agriculture announces the Commodity Credit Corporation has bought certain things.

Q. Announces purchases by the Commodity Credit Corporation; correct? The United States Department of Agriculture—The United States Department of Agriculture which you headed announced that certain things—certain purchases were being made by the Commodity Credit Corporation, is that correct?

A. That is correct.

Q. And by "this program" I mean the program starting with the announcement of September 5, 1947 was carried out?

A. Yes, I think that is correct.

Q. Now, you say that the Commodity Credit Corporation had a board of directors, did it not?

A. Yes.

Q. And there was also a president of the board of directors?

A. Yes.

Q. Or president of the corporation. Was Mr. Gilmer one of those presidents?

A. Yes.

Q. Who was Mr. S. R. Smith?

(Testimony of Clinton P. Anderson.)

A. An official of the Production and Marketing Administration.

Q. And the Production and Marketing Administration is part of [1135] the Department of Agriculture?

A. Right, and not of the Commodity Credit Corporation.

Q. But was the relationship between the department—the Production and Marketing Administration of the Department of Agriculture and the Commodity Credit Corporation in respect to this particular program which is a subject of the lawsuit here?

A. There was no relationship between the Production and Marketing Administration and the Commodity Credit Corporation as to the purchasing of the actual raisins. The Commodity Credit Corporation has the money from the Treasurer of the United States. The Production and Marketing Administration did not. However, the Production and Marketing officials in the various areas supervised the purchase of these commodities for the Commodity Credit Corporation; did it in cotton, did it in what——

Q. And they worked with you as Secretary of Agriculture in carrying out these programs, is that right?

A. Yes.

Q. Now, will you tell me what Mr. Kunkel was?

A. No, I know him as a person in the Fruit and Vegetable Branch, but I can't tell you what his title was.

Q. Do you know who the administrator of the

(Testimony of Clinton P. Anderson.)

program instituted by the announcement of September 5 was?

A. Jess Gilmer. [1136]

Q. Now, I understand, just to deviate for a moment, that when you received from Mr. Grady a telegram of October 15th, I believe—October 14th and 15th, you referred the contents thereof to certain people. Now, just so there is no misunderstanding, I am now referring to Plaintiff's Exhibit No. 17 addressed to Clinton P. Anderson, Secretary of Agriculture and signed by Rosenberg Bros. & Co. and about which counsel has queried you, counsel for the defendant, and also to a follow-up telegram from Rosenberg Bros., October 15th, addressed to you, which is Plaintiff's Exhibit 18. You remember receiving those telegrams?

A. Yes.

Q. You have so testified?

A. Yes.

Q. And whose advice did you seek with respect to the answers to those telegrams?

A. Well, I sought the advice of the Legal Department of the Department of Agriculture, but again you have overlapping because Mr. Shulman, who is a member of the Solicitor's staff was generally advising the Commodity Credit Corporation on its operations.

I sought the advice of the Production and Marketing Administration, I sought the advise of the Commodity Credit officials.

(Testimony of Clinton P. Anderson.)

Q. Did you also seek the advice of the Production and [1137] Marketing Division, did you say that?

A. Yes.

Q. Did you seek the advice of the adminstrator of the program?

A. Yes, that was Mr. Gilmer.

Q. Did Mr. Gilmer submit to you any memoranda which had been presented to him by members of the Production and Marketing Administration reporting on this matter before you sent your telegram in response to Rosenberg Bros.?

A. I think not.

Q. You think not?

A. No.

Q. Well, the date of your telegram in response——

A. The date of the telegram to him was November 6.

Mr. Fruit: I object, the——

Mr. Dinkelspiel: What are you objecting to? I haven't asked a question.

Mr. Fruit: The telegram in question I believe will be a response to a later wire, not to the wires of October 14th and 15th. The record will show, so far as the present at least, that there was no specific reply to the wires of October and 15 in this period, but there was a reply on November 6 to Mr. Grady's wire of October 31.

Mr. Dinkelspiel: Fine. I appreciate the fact that the Secretary of Agriculture did not answer Mr.

(Testimony of Clinton P. Anderson.)

Grady's previous two wires in which he requested cancellation and offered to [1138] cancel all purchases made at less than $140 a ton. I appreciate the fact that the Secretary of Agriculture first made response, and I accept such stipulation, counsel, on November 6 which I show you Plaintiff's Exhibit No. 23, and that is a response which you made to, I believe, a wire from Rosenberg Bros. & Co. of October 31?

A. That is correct.

Q. Now, I believe you have testified in response to a question from Mr. Fruit asked of you and also in response to questions I have asked of you that you took—solicited the advice and opinion of the Solicitor's office, your lawyers, and your associates in this program, namely, members of the staff of the Production and Marketing Administration; is that correct?

A. And members of the Commodity Credit Corporation.

Q. Before answering the request of Rosenberg Bros. & Co. for cancellation, is that correct?

A. That is correct.

Q. Now will you please state to His Honor whether or not you received any written communications from your lawyers or your staff with respect to the response which you should send, if you know?

A. Yes, two things, as I have tried to say. One was the action of the Board of the Commodity Credit Corporation on October 27 turning down the Rosenberg plea, and the other was [1139] the action

(Testimony of Clinton P. Anderson.)

of the Fruit and Vegetable Branch on November 6 submitting a tentative draft of the telegram which was subsequently sent.

Mr. Dinkelspiel: Counsel, we ask you please to produce the minutes of any meeting on October 27, 1947 turning down the request of Rosenberg Bros. & Co. for cancellation. If there are such minutes those were supposed to have been furnished to us two months ago, and I am surprised to hear from this witness that such action was taken, if it was taken. Have you got them, please?

Mr. Fruit: Minutes of——

Mr. Dinkelspiel: The meeting this gentleman on the stand is talking about.

Mr. Fruit: As I understand it, you will understand my difficulty in dealing with the stipulations on file——

Mr. Dinkelspiel: I appreciate that.

Mr. Fruit: (Continuing)—at a time when I was not in the case. It is my understanding that there is a departmental policy against the publication of the minutes of the Commodity Credit Corporation meetings. [1140]

I have looked at a mimeographed copy of the minutes of this particular meeting and to the best of my recollection there is no reference in the docket to the Rosenberg case specifically. The proposal which was acted upon by the Board after discussion—to be honest, I don't even know whether it was a written proposal at the moment.

Mr. Dinkelspiel: It is all a great surprise to us, your Honor.

(Testimony of Clinton P. Anderson.)

Mr. Fruit: May I finish—was a proposal for the change—for a change in the program, a proposal for change in the program which would have involved the cancellation of all existing contracts and a shift to a substitute method of acquisition.

Now, it is my understanding, and counsel has informed me, and again this results in part from my rather hurried injection in the case under the circumstances I outlined this morning, that the nature of this proposal has been set forth in material which you have seen from the Department's files and which I assume you are using as the basis for cross-examination at this time.

Mr. Dinkelspiel: Yes. Well, I still would like to see before the conclusion of this gentleman's testimony the action taken by the Commodity Credit Corporation, if there are minutes of such action, on which he bases his testimony and which comes to us a surprise at this time. [1141]

The Court: Counsel indicated you have seen a copy?

Mr. Fruit: Yes, I will be glad to show you a copy.

The Court: Show it to counsel.

* * *

Mr. Dinkelspiel: Now, we were discussing with the Senator at the conclusion of the session before the recess the matter of action taken at a special meeting of the Board of Directors of the Commodity Credit Corporation. Counsel has now given to me

(Testimony of Clinton P. Anderson.)

the minutes of this meeting and said that we many also note who was there. I think counsel is reasonable in suggesting that we need not refer to that which does not relate to this program, the issue here, we don't intend to.

Present at the meeting, which was stated to have taken place on October 27, 1947, in the conference room of the chairman was: Anderson, Clinton P., Secretary of Agriculture, Chairman.

Q. Now, this is a meeting of the Commodity Credit Corporation, Senator Anderson. Apparently you were chairman at that time of the corporation? [1142] A. I was at all times.

Q. At all times, all right.

Mr. Fruit: May I give the Senator a portion of the copy——

Mr. Dinkelspiel: Surely, he has.

Mr. Fruit: Oh, you have.

Mr. Dinkelspiel: As a matter of fact, he said I could have found the minutes right in his brief case if I had looked for them. I haven't that long an arm, Senator.

N. E. Dodd, Undersecretary of Agriculture; Jesse B. Gilmer, Administrator, Production and Marketing Administration.

Q. That's the gentleman you said was in charge, was the administrator of this program, is that correct? A. Yes.

Q. Dave Davidson, Assistant Administrator for Production, Production and Marketing Administration. Just by way of an identification, was he the

(Testimony of Clinton P. Anderson.)

gentleman whom you told Mr. Grady would be in charge of any further protestation from him?

A. No, I think I said Mr. Gilmer, but I probably also included Dave Davidson's name, because he came from California and was very familiar with the program.

Q. C. C. Farrington, Assistant Administrator for Commodity Credit Corporation, Production and Marketing Administration; Ralph S. Trigg, Deputy Administrator, Production and Marketing Division. There are other people present whose names I don't think are necessary to introduce. [1143]

Mr. Dinkelspiel: I see now for the first time, your Honor, what is entitled "Present situation within the raisin industry."

Now, what is this, counsel; these two photostats?

Mr. Fruit: That is the part which relates, that is, in which this action which the Senator has referred was taken. May I say that these are not only by regulation of the Department of Agriculture and the Commodity Credit Corporation, the Code of Federal Regulations, confidential, I have not seen fit in connection with this document to exclude this from counsel's view; after all this took place seven years ago.

Mr. Dinkelspiel: I don't think it exactly affects the national security, does it, counsel?

Mr. Fruit: May I ask what counsel intends to do with it?

Mr. Dinkelspiel: We intend to show what action was taken to which the witness has referred

(Testimony of Clinton P. Anderson.)

on cross-examination—under direct examination. I intend to read it into evidence.

Mr. Fruit: Well, I believe the Senator's own testimony would be——

Mr. Dinkelspiel: No.

Mr. Fruit: ——be better evidence than this.

Mr. Dinkelspiel: We hope to have both, Mr. Fruit. He said that an action was taken by the Board of the Commodity Credit Corporation and I have asked for the production of the proceedings of that Board. [1144]

Mr. Fruit: Well, in this instance I have no objection of putting this in, if it makes no precedent——

Mr. Dinkelspiel: Counsel has given me what he asserts to be the proceedings of the Board with respect to the matter of these contracts of which Rosenberg Bros. & Co. was one, and I now read——

I have been shown the fact that this is the only reference to this particular subject matter. I will read, if your Honor please.

"Present situation within the raisin industry" is the title.

"Mr. S. R. Smith, Director, Fruit and Vegetable Branch, Production and Marketing Administration, presented for Board consideration a memorandum addressed to the Administrator, on the above-entitled subject proposing to amend further docket No. OC-95a, entitled 'Dried fruit price support program,' approved by the Board on August 27, 1947, and by the Acting Secretary of Agriculture on September 11, 1947. Mr. E. M. Graham, Chief, Dried

(Testimony of Clinton P. Anderson.)

Fruit Division, Fruit and Vegetable Branch, Production and Marketing Administration, was also present for this discussion.

"(The Secretary of Agriculture entered the meeting at this point and took the chair.) [1145]

"The memorandum, which had been previously circulated to the Board, proposed that docket No. OC-95a, as amended, be further amended to provide (1) that existing contracts between Commodity Credit Corporation and processors for 61,000 tons of raisins be renegotiated to increase the purchase price thereunder to an amount which would permit the packer to pay producers not less than $135 per ton for natural condition raisins; (2) that offers be invited from processors on a bid basis on processed raisins conditioned upon payment to producers of $135 per ton; and (3) that acceptances on the additional 60,000 tons upon which offers are to be (credited) be limited to 35,000 tons on the first offering."

Mr. Fruit: May I interject? The "credit" should be "requested."

Mr. Dinkelspiel: Well, the word "requested" should have been "credited"?

Mr. Fruit: No, the reverse. The word "credited" as you dictated it, should have been "requested."

Mr. Dinkelspiel: Which did I do wrong?

Mr. Fruit: You said "credited." It was just an inadvertence.

Mr. Dinkelspiel: All right, "which offers are

(Testimony of Clinton P. Anderson.)

to be [1146] requested be limited to 35,000 tons on the first offering."

"After extended discussion, it was the consensus of the Board that no action should be taken with respect to the proposed amendment. It was the understanding of the Board, however, that the action taken today was not intended to deny to the (Board) the right to propose further amendments to the program should any new circumstances develop which would warrant the Board's further consideration of the matter."

Mr. Fruit: May I make one further objection, in the last sentence, for the reporter's understanding. It begins with: "It was the understanding of the Board, however, that the action taken today was not intended to deny to the branch—at that point the word was read "Board," and should have been "Branch."

Mr. Dinkelspiel: "* * * deny to the Branch——" the Branch, I understand, is the Fruit and Vegetable Branch of the Production and Marketing Administration, is that right? Haven't you got any letters for it?

I offer, if your Honor please, these proceedings, copy of these proceedings in evidence as Plaintiff's Exhibit next in order.

The Court: They may be marked.

The Clerk: Two sheets as one, counsel? [1147]

Q. (By Mr. Dinkelspiel): Now, there is a reference, Senator Anderson, to a docket——

The Clerk: Plaintiff's Exhibit 49 in evidence.

(Testimony of Clinton P. Anderson.)

(Whereupon the minutes of the Board referred to above were received in evidence and marked Plaintiff's Exhibit No. 49.)

Q. (By Mr. Dinkelspiel, continuing): ——that's to a docket number; it bears the number Plaintiff's Exhibit No. 5 here, bears the official number OC-95a.

A. I think that is the document which I submitted, the only copy for——

Q. This is the docket that you submitted which is a docket which started or involves this program announced by you on September 5?

A. That is correct.

Q. Now, the minutes of that meeting, or the minutes of the proceedings refer, do they not, in a report from Mr. S. R. Smith?

A. That's right.

Q. Mr. S. R. Smith was part of the Fruit—Director of the Fruit and Vegetable Branch of the office of PMA? A. That's right.

Q. I show you a communication dated October 23, 1947, copy of a communication addressed to the Administrator from the Director of the Fruit and Vegetable Branch, subject: Present [1148] situation within the raisin industry, and ask you, Senator, if you saw that report at any time prior to the meeting of October 27 or at any time prior, let us say, to your sending your telegram of December 6 to Rosenberg Bros. & Co.

Mr. Ehrlich: November 6 to Rosenberg Bros. & Co.

(Testimony of Clinton P. Anderson.)

Mr. Ehrlich: November 6.

Q. (By Mr. Dinkelspiel): November 6.

A. I think I did not see it prior to the meeting of the Board. It was considered fully at the meeting of the Board on October 27, but I did see it at that time and discussed it at that time.

Q. Referred to, I believe, in the proceedings of the Board.

Mr. Dinkelspiel: I will offer this in evidence, your Honor, as Plaintiff's Exhibit next in order.

The Court: May be marked.

The Clerk: Plaintiff's Exhibit 50 in evidence.

(Whereupon the document referred to above was received in evidence and marked Plaintiff's Exhibit No. 50.)

The Court: May I see it, counsel?

Mr. Dinkelspiel: I will save my voice, your Honor, if your Honor would read it. I don't have to have it read into the record.

The Court: You can proceed and go right along: I will read it as you proceed.

Q. (By Mr. Dinkelspiel): Was there also a communication [1149] received by you or presented to the Board generally on the same subject matter by Mr. C. F. Kunkel?

A. I think not. I do not know. There was a memorandum by Mr. Kunkel that circulated in the Department. I do not believe it was ever formally presented to the Board. I am not able to testify positively, but that is my remembrance.

(Testimony of Clinton P. Anderson.)

Q. Is this what happened? That this Kunkel's memorandum was presented and discussed, presented to and discussed by the Board but subsequently replaced by Mr. Smith's memorandum as expressing the views of the Fruit and Vegetable Branch, PMA?

A. If it may be understood that I am not testifying to facts, I would say I do not think that is the situation. I think the report was presented to the Production and Marketing Administration and they determined that Mr. Smith should present his recommendations instead.

Q. Now, you had a rather interesting, if we can use it, an understatement, conversation with Mr Grady, I believe, on what date?

A. November 19.

Q. November 19. Now, on that occasion you reviewed, as I understand your testimony of this morning, you reviewed Mr. Grady's long telegram to you of—— A. October 31.

Mr. Ehrlich: No. 21.

Q. (By Mr. Dinkelspiel): I just want to ask one question: I [1150] know that memory is a tricky thing and often the best of us have some confusion about what takes place, an event. And no offense is meant by my asking you that, that you had this telegram before you when Mr. Grady was present in your office?

A. I had that telegram and all the other telegrams he had sent in recently.

(Testimony of Clinton P. Anderson.)

Q. Because you hadn't answered any of them up to that time, is that right?

A. No, I had answered them by the action of the Board which had been subsequently communicated in the telegram of November 6, but very little had gone out to Mr. Grady, and the material was in the office from Rosenberg's, was assembled together and brought to my office with comments prior to the time he came into the office.

Q. Now, this was what date?

A. This was on November the 19th.

Q. And it was a long conversation, wasn't it?

A. Yes.

Q. Lasted well over an hour, didn't it?

A. As I remember, it did. It was a long conversation, in any event, because those days we started out by trying to have 20-minute appointments and before the day was through we would have to divide those into a few minutes, sometimes, and take as long a time as I did was unusual. Therefore, I say it was a long conversation. I wouldn't attempt to fix the time. [1151]

Q. You and Mr. Grady expressed regards for each other in the fashion that you, you were both tough squareshooters, could talk frankly to each other?

A. I don't think that got into it at all.

Q. You don't think that got into it at all?

A. I don't believe so. But we did have a very frank conversation. Mr. Grady spoke very frankly,

(Testimony of Clinton P. Anderson.)

and I tried to speak very frankly, and it was very satisfactory—I thought a revealing conversation.

Q. Now, you expressed dissatisfaction that Rosenberg Bros. were attempting to cancel its contracts, did you not?

A. Not so much the satisfaction, but the fact that there was nothing I could do about it, in my opinion.

Q. And did you tell him anything about other processors, what they were doing? A. I did.

Q. What did you tell him?

A. Told him Sunmaid seemed to be satisfied with what was going on, that many people probably were not happy at the prices they bid, but they were at least going forward with the program.

Q. Did you tell them that you had any other protests? A. No.

Q. Did you have any other protests?

A. I think probably there were some other protests in the Department; they had not been brought to me. [1152]

Q. So when you had your conversation with Mr. Grady—is this a fair statement of your testimony—you did not know of any other protests?

A. Yes.

Q. You did not?

A. I did not. None that were regarded as serious. I think many people followed along, if they were going to get any relief if Rosenberg got it.

Q. What do you mean by not serious?

A. I mean they were formal protests but in this effect, that if you raised the prices to Rosenberg

(Testimony of Clinton P. Anderson.)

to $135, growers guaranteed, they all wanted to be raised.

Q. Would you call the telegram of purported cancellations serious?

A. I have no knowledge of other telegrams of purported cancellations.

Q. Telegrams of requested cancellation. Now, Mr. Senator, you were head of the Department and you were talking to one of the principal packers on this occasion in November? A. Yes, sir.

Q. Did you, or did you not know that there were protests and telegrams requesting cancellation before your Department from the Lyon Packing Company, Bonner Packing Company, Fuhl Bros. Packing Co., Central Valley Raisin Co., Central California Packing Co., Hunt Foods, Guggenheim Division, Vagen Packing Co., [1153] and West Coast Growers and Packers? A. No, I did not.

Q. You mean to tell the Court that you, as Secretary of Agriculture, on the occasion when you discussed with a protestant and told him that you knew of no other packers protesting, that you didn't know of other packers' protesting?

A. No, I said the significant packers, the big supplier was Sunmaid. Sunmaid seemed to be very happy.

Q. And isn't it true that Mr. Grady discussed with you the dual position in which Sunmaid was in, that it was both a packer and a grower and it could meet any of those difficulties as a packer by the benefits it received from the growers?

(Testimony of Clinton P. Anderson.)

A. Yes.

Q. Did you recognize that as a distinction?

A. No.

Q. To your mind that was no distinction between a company that was faced with a loss because it could not get a product to meet a demand and a company that had available to it that product?

A. I couldn't recognize he was faced with a loss because Mr. Grady testified that they had not bought any raisins to fulfill the contract on the first of October.

Q. You were told he had not bought any raisins to fulfill——

A. I asked him the specific question when he sent this telegram requesting cancellation on the 14th whether he owned [1154] a single pound of raisins to fulfill it. He said he did not.

Q. And did that come as a surprise to you, Mr. Secretary? That a man in October did not have the full complement of a contract for 10,000 tons of raisins?

A. It surely did.

Q. Do you know anything about the raisin industry, Mr. Senator?

A. Well, I wish I had known less.

Q. Maybe you wish maybe you had known more, sir. Do you know when raisins are harvested, when they come off the trays?

A. I have an idea that it is in the period of October, yes.

Q. And do you know that——

(Testimony of Clinton P. Anderson.)

A. But I know that people can buy in anticipation.

Q. You know of the method of buying in anticipation, and you also know that packers who know the ropes know the time of the year in which to buy. Let me ask you—that is not a question.

A. They may have known the time to buy but their judgment wasn't confirmed by what they did in 1947.

Q. All right. But you're telling me now that you did not know that Rosenberg Bros. & Co. were short when it bid for the contracts in September?

A. That's right.

Q. Didn't Mr. Smith tell you that he [1155] knew? A. No, sir.

Q. Did you ever ask him? A. No.

Q. Did you ever ask any of them?

A. I would have no reason to ask Mr. Smith if one firm was short and the other long.

Q. Well, which firm was long?

A. I didn't say that, but I would have no reason to ask him whether a firm was long or short.

Q. Aren't you interested to know what the effect of your program would be upon "A", the growers, and "B", the packers?

A. We found out what the effect of the program would be on growers.

Q. And you were interested, were you not?

A. Very definitely.

Q. Right from the start? A. That's right.

Q. Did anybody ever tell you at the start that call-

(Testimony of Clinton P. Anderson.)

ing for competitive bids from the packers would never increase the price to the growers?

A. Yes.

Q. And you didn't believe them, did you?

A. No.

Q. Turned out to be true, didn't it?

A. Because only they tried to gut the [1156] people.

Q. The packers ganged up on you, didn't they?

A. Not on me; they ganged up on the growers.

Q. And that is your contention, and has been your contention from the start, hasn't it?

A. To this very day.

Q. To this very day. And you make one exception, do you?

A. Sunmaid was in a wholly different position, of course. I recognize that.

Q. Didn't they bid on the same competitive basis as everybody else? A. That's right.

The Court: One interruption. That statement, there was an objection in the record on several occasions with respect to the processors ganging up on the growers. May I have an amplification from you on that subject, Senator, with respect to precisely what you mean by the terminology?

The Witness: Yes, Your Honor.

The Court: The implications which may be attendant upon that statement.

The Witness: If I get across the line trying to explain it, I hope you will excuse me.

The Court: I am asking for an explanation with

(Testimony of Clinton P. Anderson.)

respect to the year in question—I assume it applies to this year.

The Witness: Absolutely.

The Court: All right. [1157]

The Witness: I had come to California in 1947, I had met with growers in an attempt to improve the raisin situation. I had no other purpose in meeting with the growers, except to improve the grower price. I had declined to give them a 90 per cent or 100 per cent of parity price. But I had indicated all the way through that I was hoping the grower price could be improved, and no one could have been more surprised than I when these bids came in and people who were not in possession of raisins, it developed later, bid at a price that couldn't possibly have improved the grower price. They bid for $110 a ton when we were trying to put the price above $125 ton. [1158]

Q. Now—pardon me. A. All right.

Q. Now, Senator,——

A. That is the only reason that I say——

Mr. Fruit: May the witness finish?

The Witness (Continuing): That is the only reason I say they ganged up on the growers. If Rosenberg and others had bid at a basis of $135 in the first offering, which they had a perfect right to do, they would have all obtained a share of the market and the growers would have obtained a decent price. That is my only point.

The Court: What relationship did the sum of $125

(Testimony of Clinton P. Anderson.)

have to do with the general market conditions, having in mind you had a surplus of 100,000 tons?

The Witness: Well, it had only this to do, that in the fresh fruit and vegetable business there are plenty of instances where, when there was a surplus crop, a portion of it was removed at a lower price than the crop itself would get, a two-price system, to be sure. You have it in grapefruit, you have it in oranges, you have it in a great many things, and the Department had been trying for years to bring about a situation in the raisin industry where the raisin people would move their surplus commodities at a lower price and the rest of it at a higher price.

The Court: Without unduly interrupting [1159] the cross-examination, I am not inclined to do that, merely to clarify my own thinking, is it your position that the price submitted by Rosenberg Bros. & Co., bore no relationship to the law of supply and demand, but were purely arbitrary and inclined to——

The Witness: Well, I would say that from the date that I came out to California in August, Mr. Grady became persuaded that the price of raisins would go down instead of up, and he sold on that basis, sold short on that basis, and followed the theory all the way through that what we were trying to do was drive down the price of raisins. And I have no idea what would happen if there had been an attempt to co-operate with the Government. I think it would have been much different.

Q. By Mr. Dinkelspiel: Senator Anderson,

(Testimony of Clinton P. Anderson.)

you told us today that the reason you did not, real reason you didn't cancel the contracts, and why the solicitor told you you couldn't cancel the contracts, because of the financial loss through such cancellation to the United States, the same as there would be a financial loss between two private parties.

Mr. Fruit: I object to that point, I don't believe he said that.

The Witness: I don't think——

Mr. Fruit: ——that was the real purpose. [1160] He said that was an important or primary issue.

Mr. Dinkelspiel: I will quote the statements.

The Witness: All right.

Q. (By Mr. Dinkelspiel): Paraphrase them, I won't quote them, I haven't the memory for quotation.

He was advised not to cancel because of—it would be a financial disadvantage and you would be subjected to criticism by the comptroller general with whom you had a to-do in the past, and the second reason, as a business proposition, it would not have been proper, and thirdly, cancelling would have been a new program and your Board didn't authorize any new program.

Now, referring to the business proposition, it would not have been proper, and because it was a financial disadvantage its true, is it not, Senator, that the $151 bid of Rosenberg Bros., under the first offer was the lowest bid made?

A. That's right.

Q. It was also true, was it not, that that bid

(Testimony of Clinton P. Anderson.)

was lower than you could have then obtained from packers? By "then", I mean at the time of your conference with Mr. Grady in November of 1947. $151 was lower than you could have expected to buy raisins processed at that time?

A. I think on the November date, it wouln't have been in the February date.

Q. I am talking about the November date when you had this conversation. [1161]

A. Yes; I think $110 or $115 a ton to the grower was lower than we could have bought them at that time. Earlier we might have, and later we might have, but not at that time, that particular time.

Q. Hence, the financial loss you were talking about because you had an advantageous contract, is that right?

Mr. Fruit: I object to that, that calls for——

The Witness: It is not——

Mr. Fruit: ——conclusion.

The Court: Overruled.

Q. (By Mr. Dinkelspiel): Well, what is your financial loss that you anticipate, the reason that you expected the Comptroller General to be angry with you if you cancelled these contracts?

A. Because if we cancelled the Rosenberg contracts, which was the lowest of all the contracts on the first bidding, and substituted the man that stood above the highest bidder who was successful in the bidding, there was a wide spread between those prices, and I was not allowed under law to cancel

(Testimony of Clinton P. Anderson.)

a contract if it was not to the financial advantage of the Government to cancel it.

Q. So that it was, putting it the other way, that this cancellation would have been to the financial disadvantage of the Government? [1162]

A. Yes, but that wasn't the reason; the reason was that you are not permitted to cancel a contract.

Q. The fact is—— A. To the Government.

Q. It was reported by you or to you that it was to the financial disadvantage of the Government to cancel and therefore some lawyer told you you couldn't cancel it. Now, that's a fair statement of it, is it not?

A. Why, I don't think just some lawyer told me.

Q. Your lawyer?

A. The Assistant Solicitor, and then I checked with the Solicitor, and they read me the law. The law was perfectly clear.

Q. Now, that all goes back to the fact that this was a contract financially beneficial to the Government?

A. It was beneficially advantageous to the grower, tried to be; the Government had no interest in this.

Q. I beg your pardon, will you explain how the contract of Rosenberg Bros. for $151 a ton would have been of advantage to the growers?

A. I am trying to say that removing of that surplus, even at $110 a ton, was of advantage to the growers. If we had allowed the entire crop of 300,000 tons to have been marketed without taking a

(Testimony of Clinton P. Anderson.)

hundred thousand tons out of the market, all the prices to the growers would have been down [1163] and stayed down forever.

Q. Now, Senator, I don't mean to mislead you, and it is a very simple examination that I am conducting at the moment. You told his Honor, under oath, that you couldn't cancel these contracts and you were so advised because there would be a financial disadvantage to the Government?

A. I have said I couldn't cancel them unless it was to the financial advantage of the Government.

Q. Okay. That has nothing to do, has it, Mr. Witness, with financial advantage or disadvantage to the growers? A. No; I think not.

Q. So now we will get back to your original testimony that a financial disadvantage to the Government precluded you, in the opinion of the solicitor, from cancelling?

A. Well, you keep using the word "disadvantage" and I keep using the word "advantage." I can't cancel unless it is a financial advantage to the Government.

Q. All right, accept your words, you can't cancel unless it is for the financial advantage of the Government? A. That's right.

Q. Now, it would not have been, under these circumstances to the financial advantage of the Government to cancel Rosenberg's contract and accept a contract at a higher price?

A. I agree completely.

Q. All right. [1164] A. Yes, sir.

(Testimony of Clinton P. Anderson.)

Q. Now, didn't you know, and don't you know now that there is a very substantial difference between the natural raisin price paid to the grower and the price at which the processor sells it to the Government or in retail? A. Of course.

Q. And known in the trade generally at about $40 differential?

A. Well, I think others take it about thirty.

Q. Thirty to forty, somewheres in there.

A. Sunmaid figures about thirty, Cal-Pak about that.

Q. You knew then, when you received Rosenberg Bros. & Co. bid of $151 a ton, now you knew that when you received it, that they could not have come out whole on that contract unless they bought the raisins, for, in your opinion, $30 less, in their opinion, $40 less, from the grower?

Mr. Fruit: I object to the question, that is a great deal of speculation.

The Court: Overruled.

Q. (By Mr. Dinkelspiel): And yet you, the Secretary of Agriculture, who was trying to put in a program for the benefit of the growers, had called for competitive bids from the packers, that is correct, is it not? A. That's right.

Q. And you knew, did you not, that competitive bids meant awards, and you so stated in your announcement, to the lowest [1465] bidders?

A. That's right.

Q. Will you explain to his Honor how that possibly could have benefited the growers?

(Testimony of Clinton P. Anderson.)

A. Very simply, pointing out that when you had co-operation from the packers, as we had in the prune business, where Rosenberg Bros. themselves were involved, we did improve the situation of the growers. The difficulty came when you have a packer who is in a long position on prunes and a short position on raisins.

Now, that's the whole problem, and they applauded the program on prunes. Why? Because they made a fortune out of prunes, but they criticized the program on raisins, because they didn't on raisins. It is as simple as that.

Mr. Dinkelspiel: I move the witness' answer be stricken, your Honor, as a voluntary statement.

The Court: Motion denied.

Mr. Fruit: Pardon?

The Court: It may remain in the record.

Q. (By Mr. Dinkelspiel): So in September, before there were any raisins in the trays, you expected Rosenberg Bros., if I understand your testimony, to have sufficient raisins on hand to sell to the Government at a competitive price, that is correct, is it not? [1166]

A. I would. I'd like to give you a little longer answer. The simple answer is yes.

Q. All right, you can explain, as his Honor will tell you.

A. The longer answer is this: That I had been engaged for a long time in the surety bonding business, and if a man offers to build a building for a million dollars, he doesn't own all the cement, all

(Testimony of Clinton P. Anderson.)

the bricks, all the material that goes into that building but he knows where he can buy it immediately after his bid is accepted; and I thought Rosenberg Brothers were doing exactly the same thing, that they were going to submit a bid and knew where they could buy their raisins immediately afterwards, just as any contractor would do, when he built a building.

Q. And did you expect them to buy the raisins at higher than $110 per ton to meet a sale to you at $150 per ton?

A. Well, I thought it would be a little higher than that, but not much. I didn't think it would be above $120 a ton.

Q. And wasn't the aim of the growers $135 per ton?

A. Yes—no, the aim of the growers was $190 per ton.

Q. Well, the government would have been satisfied to have the growers prices at $135 a ton?

A. On that portion of the crop that was removed into surplus, yes.

Q. Now, Senator, I understood you to say, and I want you to really think this one over, that Mr. Grady did not [1167] offer to cancel all grower contracts at less than $140 per ton but only purchases made for the government. Do you wish to consider that question again?

A. Well, it is my remembrance that that is exactly what he said. I asked him if that applied to all the contracts they had for supplying private customers as well as the government, and he said,

(Testimony of Clinton P. Anderson.)

"That doesn't apply to deals that are closed."

Q. Deals that are closed? A. Yes.

Q. Well, you mean where they had made delivery? A. No; sales that had been made.

Q. Now, have you read or did you read at that time—you said you had it before you—Plaintiff's Exhibit Number 18? A. Yes.

Q. Was that limited, I ask you, and is it limited to government contracts?

Mr. Fruit: I object. The witness has been testifying on request to a date of November 19th, as I remember it, 1947, and the date of this wire is October 15th, 1947.

Mr. Dinkelspiel: Counsel, you remember that Rosenberg Brothers hadn't even had the courtesy of a reply until November 6th.

Mr. Fruit: That is an irrelevancy, the time spread here makes your question improper, [1168] sir.

The Court: Overruled.

Q. (By Mr. Dinkelspiel): You had that wire before you, didn't you, Mr. Senator?

A. I did.

Q. And you knew its contents, of course, you were familiar with it? A. Yes.

Q. And it says, does it not, that they would cancel contracts at less than $140 per ton?

A. I thought the telegram was ambiguous. It says, "Requesting cancellation of our Commodity Credit Corporation raisin contracts."

Q. Go ahead.

A. "Wish to advise that a consideration of your

(Testimony of Clinton P. Anderson.)

agreement to so cancel"—referring only to the Commodity Credit Corporation raisin contracts—"we are willing to cancel our existing grower contracts."

Q. No limitation is there? A. No. [1169]

* * *

Q. (By Mr. Dinkelspiel): You testified here before, Senator Anderson, with respect to this Exhibit Number 4 where there was a maximum of 133,000 tons as mentioned and I would like to read from your testimony given at this trial on page 886 and 887. After colloquy the witness says—you, Senator—"I will read only the paragraph. The paragraph in full reads as follows:

"'The maximum limit of 133,000 tons is divided into purchase of 2,250 tons of dried apples, 3,750 tons of dried peaches, 61,000 tons of raisins, and 66,000 tons of dried prunes.'

"The limit is on the 133,000 tons. The limit is not on 61,000 or 66,000 or any one of the individual items within the paragraph."

Is that still your construction of that paragraph?

A. Yes.

Q. So the limit is on the total, but not upon the division? A. Yes.

Q. Now, you also state at page 886:

"The Witness: The press announcement said that the maximum limit of the program would be 133,000 tons, and that is the maximum limit. It is put on there in order that there may be a control on the officials of the Commodity Credit Corporation and that the people within the branches may not exceed their contractual authority." [1171]

(Testimony of Clinton P. Anderson.)

Is that still your testimony? A. Yes.

Q. So the limit is put on for the purpose of controlling people inside your own organization?

A. That's right.

Q. And is that a reason to announce it to the public? I stand on the question.

A. I don't know whether it is a reason to announce it to the public or not, but it is a great help if it is announced to the public.

Q. I see. But this, you still say, is a maximum put in there to control Mr. Smith and Mr. Kunkel and all these other people, is that right?

A. That is correct.

Q. It is put in the docket for the same reason, is it? A. Yes.

Q. Who prepared the announcement of dried fruit program?

A. The announcement was prepared in Washington and brought to Albuquerque. I changed the section of it that relates to the maximum limit, "shall be 133,000 tons." [1172]

* * *

Q. * * * Do you recall the rejection of bids on November 26 because the prices were too high?

A. Yes; we were trying to help growers, and if the prices were that high, they didn't need our help.

Q. All right, and do you recall having rejected growers' bids because the prices were too high?

A. Surely.

Q. And this was all in the period when you were

(Testimony of Clinton P. Anderson.)

holding Rosenberg Bros. and the other contractors to their contracts, isn't that correct, it all occurred during that November-December period?

A. That is right.

Q. Between October 15 and November 5 there was very little trading between growers and packers. Is that a true statement to your knowledge?

A. Yes; I think that is a true statement. There was trading between packers and merchants, but very little between [1175] growers and packers.

Q. Now, when the program was inaugurated in November, the latter part of November to require each bidder to certify, if a packer, that it had bought the raisins at not less than $135 a ton, did you consider the effect that would have upon the score of packers who had bid in response to your invitation and the announcement of the program?

A. I had the feeling that—I may be wrong—that it wouldn't have too much effect upon it. [1176]

* * *

The Court: Senator, I have Exhibit 50 before me which purports to be a copy of a memorandum from S. R. Smith to the Administrator from Director of the Fruit and Vegetable Branch. Now, S. R. Smith is the Director of the Fruit and Vegetable Branch?

The Witness: In the Production and Marketing Administration.

The Court: Is he the gentleman who has been in attendance in Court here?

(Testimony of Clinton P. Anderson.)

The Witness: Yes, he is.

The Court: And he has been in the Department for a number of years, has he?

The Witness: Very many years, yes, sir; highly regarded.

The Court: This memorandum dated October 23, 1947—I assume that you read this, Senator, when it was transmitted to you? [1177]

The Witness: Yes.

The Court: Did you agree or disagree with the contents and subject matter and recommendations?

The Witness: We disagreed.

The Court: To what extent, and in particular specifically?

The Witness: Principally because he had recommended that 61,000 tons of raisins which had been purchased and for which valid contracts existed be renegotiated at a price of $135 to growers, and we were against that legal question again. We had no authority to revise those contracts upwards by any such procedure.

I would like to point out—I hope I am not transgressing when I do it, your Honor, that the Commodity Credit Corporation Charter had been submitted to the Congress, a new Charter had been submitted to the Congress of the United States in that we had requested authority to modify contracts that we might make of this nature, and we had been sharply criticized, and the final Charter as adopted, although it was adopted later than this date, did not permit the Department to modify contracts.

(Testimony of Clinton P. Anderson.)

They have held to the other position. Our Board took the position that we could not accept the recommendation of the Fruit and Vegetable Branch, and therefore did not.

The Court: Well, other than with respect to the legalistics, were there any other matters to which you may refer [1178] wherein you had any disagreement with Mr. Smith's recommendation?

A. Well, we thought also that since we were dealing with 300,000 tons and not 61,000 tons, that if we arbitrarily hiked the price, by any such figure as that on a surplus removal proposed by a support program of that nature that we would lay ourselves open to various criticisms for interfering with all the rest of the 200,000 tons, at least, that might have to move in normal channels. In other words, Sprague Warner or some other raisin firm might have contracted to purchase great quantities of raisins and might have contracted to move those out to the tray. Then we arbitrarily raise the price. What happens to those contracts? We couldn't discern that.

The Court: Well, I may surmise from the memorandum submitted that Mr. Smith assumed to have the pulse of the situation. Would you say that he had a fairly definite contact with the immediate problems involved?

The Witness: I would say, your Honor, that I had a great deal of confidence in Mr. Smith, that I had watched his work a long time and I do think

(Testimony of Clinton P. Anderson.)

that he had the pulse of the situation reasonably well, yes.

The Court: And when you say colloquially "we disagreed," to whom have you reference?

The Witness: The Board of Directors of the Commodity [1179] Credit Corporation. See, that is the reason the Department sets it up, and that is why I had difficulty with my answer to Mr. Dinkelspiel earlier.

The law imposes upon the Secretary of Agriculture the responsibility for supporting these prices, but it then gives him the Commodity Credit Corporation through which he must support them so that the Production and Marketing Administration and Mr. Smith's office could come in with a recommendation that we do certain things, but the Board of Directors of the Commodity Credit Corporation with many fiscal experts might decide it was not the thing to do at all.

The Court: Mr. Smith points out in counter-distinction, apparently, that Rosenberg Bros. was in a position—more or less alone—that,

"In fact, requests for renegotiation or cancellation of such contracts have already been received from 10 of 13 contracting processors."

That was a fact, I assume?

The Witness: I assume so.

The Court: Therefore, Rosenberg was not isolated in that situation?

The Witness: That is correct.

The Court: What position did Sunmaid as-

(Testimony of Clinton P. Anderson.)

sume? How were they distinguished from the others? [1180]

The Witness: I don't recall, but I do not recall that they objected at all to the program. Now, that could be not correct, but the impression that we had was that Rosenberg was carrying the burden on this, and that others were happy to follow. I couldn't blame them if they had contracted to sell in civilian trade on the basis of raisins bought at $110 a ton; they had a windfall of $25 a ton in all the civilian trade.

The Court: I am not a specialist in these matters, and I do not assume to be, and I take it that you do not assume to be a specialist. We might read from this memorandum—and I take it Mr. Smith is a specialist.

The Witness: Yes.

The Court: Here's what he says:

"Since the issuance of the October 14 press release, the industry has been in a state of confusion and trading in raisins has been practically at a standstill. Processors have withdrawn quotations from the trade. Producers are not inclined to sell natural condition fruit to processors in view of the impending purchase of raisins from them by CCC. This situation is resulting in loss of consumption at a time when heavy movement is usually in progress. Under normal conditions 50 per cent of the total raisin movement to market occurs during the three months, October to December, inclusive, of each year." [1181]

(Testimony of Clinton P. Anderson.)

Now, that paragraph, Senator—and I say it quite respectfully to you—would prove most significant in my mind if I read it, even as an uninitiated.

The Witness: You would have to remember, your Honor, that Rosenbergs stood ready to deliver when it was profitable to deliver. They stood ready to deliver in January and February when the market had gone back down to where they could buy raisins at $110.

Mr. Dinkelspiel: But we are talking about the October date.

The Court: I may be fairly obtuse, and I want you to clarify my mind if I am. How could you expect Rosenberg to pick up the commodity or the raisins if the market conditions were so chaotic and lacked such stability as directed the picking up of the raisins?

The Witness: I hope I stay within the right bounds when I say to you that we actually assumed that Rosenberg Brothers would have what they bid or would know how to pick up what they bid. The only other assumption that can be drawn is that by bidding low they were trying to drive the market down. We did not take that assumption. We took the assumption that Rosenbergs knew where they could go to get these raisins up at $110 a ton. There had been people all through the valley that thought the price was going to drop to $90 a ton and we assumed that [1182] Rosenberg, which was the bell wether in the raisin industry, knew where it could go pick up those raisins.

(Testimony of Clinton P. Anderson.)

The Court: By parity of reasoning, then, the 11 or 12 other processors stood in a comparable position, is that correct?

A. Yes, sir, and many of them did go buy and get along. You notice that in spite of all the telegrams no processor went broke, no processor went into bankruptcy.

The Court: Well, you assume, Senator, that in order to compete in our economy that you must go broke on given occasions?

The Witness: No, I do not, but I don't send telegrams saying, "If you do a certain thing every processor is going broke," and then not have it called to my attention afterwards that they didn't go broke. We regarded that as just a little bit of pressure, so we would improve the prices on the domestic sales they had already made short.

Now look at the situation in prunes where they were long. The program was a wonderful program in prunes.

The Court: Senator, I am dealing with raisins. Next season we will take up prunes.

The Witness: This is all part of the fresh fruit and vegetable program, the dried fruit program. Prunes were part of it, and raisins were part of [1183] it. The same process was used in the same way. They were delighted with what we did in prunes, dismayed with what we did in raisins. Why? Because they were long on one and short on the other.

The Court: There is one other paragraph I

(Testimony of Clinton P. Anderson.)

should like your comments on, not in any sense to burden you with additional questions, but I want your aid as to your views. This is the paragraph on page 3. It states:

"The purchase of natural condition raisins from producers involves many administrative problems including allocation among producers of quantities to be purchased, matching producers' offers with processors' offers for processing, obtaining offers from processors at a reasonable charge in view of recent developments, getting empty sweat and picking boxes returned to the producers delivering natural condition fruit, and the extra clerical work that would be necessary in determining acceptability of offers when so many offers would have to be considered. Moreover, if purchases were made from processors conditioned upon their payment to producers of the announced price of not less than $135 per ton of natural condition raisins, a purchase from producers would not result in any [1184] additional benefit to them."

Now, what is your comment on that, sir?

The Witness: Well, I agree that all difficulties that he outlines there of running a raisin business are unquestionably true, but my point is that people who have been in the business for a generation ought to have known that when they bid.

The Court: And he concludes, he says,

"In fact, at a given price producers prefer selling to their regular packer rather than to the government because of the inspection and fiscal re-

(Testimony of Clinton P. Anderson.)

quirements involved in a government purchase."

The Witness: I think that is right. They had come to know Rosenberg Bros., knew they were—could sell the raisins to them, were happy to sell them to them. They had been the leaders in the business for a long time.

The Court: No further questions.

Mr. Dinkelspiel: Your Honor, before counsel resumes his direct examination I mentioned to him, and I mention to Your Honor, that I wanted to read the testimony this morning with respect to intention, and I have here that offer of proof. I am, at all counts, anxious not to go too far.

"Mr. Fruit: I intend to prove by the question and answer that the Senator did not intend this document to be any part of a contract at any time, and that he did not intend to represent [1185] by the language I quoted at that time or place or at any time that the Commodity Credit Corporation would not buy in 4917 more than 61,000 tons of raisins beginning on and after September 5, 1947.

"Mr. Dinkelspiel: May I ask counsel if he intends further to prove that the Senator communicated his intentions otherwise than through the announcement, which is Exhibit 4, to the plaintiff in this case?

"Mr. Fruit: Yes, I intend to do so.

"Mr. Dinkelspiel: You intend to do so? That the Senator communicated it?

"Mr. Fruit: No, that he did not communicate it." And I thanked him and I entered my objection.

(Testimony of Clinton P. Anderson.)

In view of the fact that there was no communication to us, it would hardly be binding upon us and so I am inclined to withdraw the objection, Your Honor, just so that there is no possibility of my having restricted the testimony too far.

The Court: The objection may be withdrawn.

Mr. Fruit: May I say at this point that when I——

The Court: With the objection withdrawn the Senator may answer the questions.

Mr. Fruit: But I wanted to direct my statement to the question of communication. I meant that I did not intend to prove that he communicated to Rosenberg or any of its [1186] representatives that he did not intend by the press release to represent that he or the Commodity Credit Corporation would not buy more than the 61,000 tons of raisins.

In other words, the press release was allowed to stand; he did not, so far as Rosenberg was concerned or any other packer as far as I know at this time, go beyond that, but I will ask him the question.

Mr. Dinkelspiel: Well, now, Your Honor, I withdraw my objection on the statement of counsel here——

Mr. Fruit: The reason I made that statement, I wanted counsel to understand what my remark signified. I am not trying to hedge or anything, but I didn't intend to mean that this document didn't

(Testimony of Clinton P. Anderson.)

in my mind speak for itself. That is, the press release.

Mr. Dinkelspiel: Well, it was my thought and maybe counsel will agree with me that if he can just take his offer of proof as he stated it as if it was the Senator's statement with the final qualification on it, you will have what you want in the record, won't you? I will stipulate that that is what the Senator would testify to and accept your stipulation on the final phase of it.

Mr. Fruit: If counsel will stipulate that that is the testimony, the equivalent of the testimony of the witness, I would stand on it.

I assume at this point that counsel is unwilling to have [1187] me ask the witness if he communicated——

Mr. Dinkelspiel: No, I don't care if you ask the witness. I was just interested in saving time.

The Court: I suggest while the Senator is here that you ask him such questions as you may think relevant, rather than have him return.

Mr. Fruit: You mean on this point?

The Court: Yes, sir.

Redirect Examination

By Mr. Fruit:

Q. Senator, will you tell the Court whether or not it was your purpose or intention by the language of the announcement contained in the press release of September 5, 1947, to make any con-

(Testimony of Clinton P. Anderson.)

tractual representation or warranty of any sort to anyone that the Commodity Credit Corporation would not buy more than 61,000 tons of raisins in the period beginning and continuing after September 5, 1947?

Mr. Dinkelspiel: I will not interpose an objection to that question——

Mr. Fruit: I am reading it from here.

Mr. Dinkelspiel: I know. I am not interposing an objection, except I do want to make the following comment: that the document, plaintiff's Exhibit No. 4, and the conduct of the parties speak for themselves, but if you wish an answer, go ahead.

Q. (By Mr. Fruit): Will you answer [1188] that question, please?

A. I did not intend to make it any part of the contract.

Mr. Fruit: All right; that is all.

Mr. Dinkelspiel: Well, we have a further question, don't we, counsel?

Q. That you did not communicate, Senator, to any of the purchasing parties otherwise than by the document, Plaintiff's Exhibit No. 4, as to what your intention was?

The Witness: I agree with that; I did [1189] not.

* * *

S. R. SMITH

called as a witness on behalf of the Government, having been previously duly sworn, testified further as follows:

The Clerk: Mr. Smith, permit me to remind you you have been sworn heretofore and you are still under oath. Please restate your name for the record.

The Witness: S. R. Smith.

Direct Examination

By Mr. Fruit:

Q. Mr. Smith, you are Chief, I believe of the Fruit and Vegetable Branch of the Production and Marketing Administration of the United States Department of Agriculture, is that correct?

A. My correct title is Director.

Q. Director of that Fruit and Vegetable Branch.

A. Correct.

Q. You have been in that position since sometime in 1946?

A. As I recall I was made Director of the Fruit and Vegetable [1191] Branch in April, 1946. [1192]

* * *

Q. Mr. Smith, when did the Department of Agriculture begin to consider or plan for assistance to the raisin producers in California in 1947?

A. As a matter of our regular activity in the Fruit and Vegetable Branch, we conduct a running survey of commodity situations with the view of anticipating problems which producers of the various fruit and vegetable items might encounter.

(Testimony of S. R. Smith.)

In 1947, as a part of that regular process, we directed our attention to the oncoming 1947 grape and raisin crop.

Q. About what time in 1947 would you say?

A. We were actively considering the problem as early as June of 1947, [1194].

Q. Well, why did you consider that assistance might be necessary?

A. There was a, or had been a sequence of events which in our opinion would bear very directly on the nature and magnitude of the problem of 1947 in the event no weather hazards contributed to reducing the grape crop in California, and that sequence of events established, at least in my mind, that 1947 would no doubt be a very difficult transitional year; transitional from the problems that confronted the grape and raisin industry during the war and the problems which they had encountered during—with the 1946 crop.

From earlier, or during June, July, 1947, we had been receiving numerous inquiries from industry groups as to what they might expect the Department of Agriculture to do in assisting them in 1947.

The nature of the inquiries to me rather clearly indicated that the various industry groups were rather optimistic as to the nature and extent of assistance that the Department might be prevailed upon to extend on behalf of the dried fruit producers, the reason for it being, as I indicated briefly before, all during the war period, for example, the raisin industry was one of the most

(Testimony of S. R. Smith.)

highly regulated agricultural industries that I know about. All of the major determinations with respect to pricing and [1195] disposal of the crop had been a matter of determination by the War Food Administration and the Office of Price Administration. In other words, the War Food Administration required, for example, that raisin variety grapes be converted into raisins. The entire output of raisins was held for disposition by the War Food Administration. The price which packers were to pay producers was determined by the War Food Administration. The maximum prices that packers could charge for packed processed raisins was determined by the Office of Price [1196] Administration.

* * *

The Witness (Continuing): I was stating that the maximum prices which packers were permitted to charge for packed processed raisins was determined by the Office of Price Administration in collaboration with the War Food Administration, which in turn, which in turn involved the payment of a subsidy to the packers to defray the difference between, or to make up for a difference that was required because the ceiling on packed processed raisins was set at a level lower than would reflect the legal minimum price for raisins, which at that time was full parity.

First order of call on the dried fruits and raisins was for the Armed Services, and for countries participating in the lend-lease program. Any balance left after meeting [1198] those needs was released

(Testimony of S. R. Smith.)

and made available to packers for sale in domestic food channels.

With that system of controls, we come to, I think it was June of 1946, when all price controls were suspended on dried fruits, including raisins. That left the industry in the position of going into the 1946 crop to handle it as they saw fit, or, in other words, without the direction or interference of any Governmental agency.

Briefly, it turned out that the Wine Industry in California, which had been held down in its utilization of grapes during the war period, was very actively interested in acquiring grapes for crushing purposes, with the result that the active bidding on the part of that interest for supplies and endeavor on the part of packers to acquire raisins, prices for raisins were bid up to quite high levels.

The raisin production that year, by previous standards, was relatively low; as I recall it, initially estimated at somewhere around 170 to 80 thousand tons. It finally turned out somewhat larger than that, about 190, as I recall. But prices were bid up to producers as high as $330 a ton, and as I recall it, the average price as reported by the Bureau of Agriculture Economics of the United States Department of Agriculture was $312 a ton.

Of course, producers, as a consequence, were in a strong financial position, such a profitable season, 1946 following [1199] a series of profitable years during the war, were in very optimistic and strong frame of mind.

(Testimony of S. R. Smith.)

The packers, on the other hand, were in quite a different position. Accompanying the bidding up of prices in the field to producers for raisins, the price which packers quoted on packed processed raisins, moved up to as high as, as I remember it, 22 cents a pound during the latter part of November of 1946. And from that time until the summer of 1947 there was a steady decline in the prices to the trade on packed processed raisins, with the level, midsummer, that is, around June or July of 1947, around ten and a half to eleven cents a pound, or about one-half of the peak to which they had arisen during the preceding crop year.

We recognized that under those circumstances the supplies which the distributive trade had acquired was on a declining market and the enthusiasm with which they would enter the market in buying 1947 raisins would be on a reserve and cautionary basis.

The Fruit and Vegetable Branch during June and July in its estimates of what might be forthcoming in the way of raisin production had formulated some preliminary ideas. Those preliminary ideas indicated that if our guesses were to materialize that a very sizeable quantity of raisins in excess of what the then prospective markets would be able to take was in prospect. [1200].

A factor which I haven't mentioned, but which was very definitely in the picture, the raisin industry prior to World War II enjoyed a very active and important export trade, averaging over a period

(Testimony of S. R. Smith.)

of years upwards of 60,000 tons of raisins a year. The aftermath of the War, as we know, left most, if not all, the European countries that constituted the export market in financial straits in a poor position to buy raisins. So that was a factor contributing to, in our consideration, of why preparations would need to be made in developing a program, some program of assistance to producers.

Q. (By Mr. Fruit): By June and July had the Fruit and Vegetable Branch of the Department of Agriculture otherwise begun to receive requests or inquiries from producers and others in the Industry with respect to assistance or possible assistance from the Department of Agriculture?

A. I don't recall whether as early as June, but certainly as early as July, we were receiving inquiries. There was an organization of raisin producers that had been created during the War Period to assist the War Food Administration in the administration of the raisin program, known as the Raisin Producers Association. It had maintained itself in existence and was acting as a spokesman on behalf of the raisin producers in the summer of 1947, and that organization, yes, was inquiring as to the nature of possible [1201] assistance, and I think it is fair to say based on what I recall about that period that they were expecting that the Department of Agriculture would do something, and they indicated that they had their ideas of what the Department should do.

Q. Well, what kind of assistance could the De-

(Testimony of S. R. Smith.)

partment of Agriculture at that time have given the Raisin Producers with respect to the expected surplus in the 1947 crop?

A. There was a variety of measures and combinations of measures which the Department could employ. The authority, as far as assistance to producers of commodities was concerned, emanated for the most part under the Commodity Credit Corporation Charter and accompanying authorit.

Then the authority which stems from what we refer to as Section 32 of Public Law 220, I think, which Law sets aside each year 30 per cent of the previous calendar year's customs revenue for use by the Secretary of Agriculture in extending assistance to agricultural commodities.

Under that authority, purchases of commodities such as raisins could be made for distribution to schools for their lunch programs, to eligible eleemosynary institutions, provided that authority for the diverting of the product to low order uses which would not be competitive with regular trade channels, provided authority for the making of indemnity payments of exports made through [1202] regular commercial channels.

There was also in that—at that time, in the picture foreign relief legislation which Congress had passed covering not only the occupied areas which our Armed Services were administering, but the activities of UNRRA and its successor organizations in rendering relief to war devastated areas. The prospect of the need of various food supplies

(Testimony of S. R. Smith.)

for those purposes were a possibility and matters for consideration in connection with considering what might be done in extending assistance on the 1947 crop. [1203].

I haven't said very much about the Commodity Credit Corporation, and its authority to extend assistance. There it has a rather wide latitude in developing——

Q. (By Mr. Fruit): May I interject, You say it has a "wide latitude". You are talking now about this period in 1947?

A. It had, yes. In developing price support programs to be effected through the purchase of commodities or the making of loans on the commodity, or it is also true in connection with Section 32 authority in engaging in surplus removal operations.

So that to list all those I mentioned, as I indicated earlier, there was quite a variety of different activities or types of programs which the Department could employ at that time in rendering assistance to an industry such as raisins. However, the authority of the Corporation, its use and its funds, the use of the funds that it had at its command were in very large measure confined to extending assistance to so-called basic agriculture commodities, and to a very limited extent to commodities other than basic agricultural commodities.

Q. Raisins were not a basic agricultural commodity?

A. They were not.

Mr. Fruit: May I note for the record that Sec-

(Testimony of S. R. Smith.)

tion 32 to which the witness referred is from Public Law No. 320 of [1204] the 74th Congress. I note that not to impeach the witness, but simply to avoid any confusion on it. I think it would be rather remarkable if he remembered the precise statutory citation.

Q. (By Mr. Fruit): You have referred to price support programs, and you have also referred to surplus removal operations. Now, what is, if any, the relationship between price support programs and surplus removal operations or programs as of this period in 1947?

A. Surplus removal is one form of supporting prices. The common understanding, connotation associated with the expression or term "price support" I find implies that the Department, through its facilities, principally the Commodity Credit Corporation, undertakes to underwrite the price of a particular commodity of a specified level, and in order to accomplish that objective it is necessary that the Corporation stand ready to have all the product that is offered to it for sale accepted by it, or all the product that is offered to it to be placed under loan, placed under loan.

In other words, that becomes necessary to achieve underwriting at a specified price level. Whereas, in the conduct of surplus removal programs you may well have a price level in mind that might be a desirable objective for the particular crop in question, but you proceed to remove [1205] from the available supply portions of it with the view that

(Testimony of S. R. Smith.)

by so doing you remove the depressing effect on the balance. But the forces of the market determine the price on the balance.

Q. You are familiar, I am sure, with the program referred to in the announcement made by the Secretary of Agriculture in his press release issued at Albuquerque, New Mexico, on September 5, 1947, are you not? A. Yes, I am.

Q. Was that a surplus removal program?

A. The manner in which the program was set up and operated would constitute it as a surplus removal program.

Q. Was it, as a surplus removal program, a price support program also?

A. Yes, surplus removal was the mechanic employed in affecting the bolstering or supporting of prices to producers as an objective of the program.

Q. But as announced at that time, it did not, in the way you have explained, support—provide for the support, rather, of raisin prices at any fixed level, is that right? A. It did not.

Q. You mentioned that in the summer of 1947 the Fruit and Vegetable Branch had analyzed the market and concluded that a substantial surplus of 1947 crop raisins was in prospect upon the basis of production and marketing expectations [1206] at that time, is that correct?

A. That is correct.

Q. Do you recall about what the expected surplus was in the Fruit and Vegetable Branch at

(Testimony of S. R. Smith.)

whatever point in the summer of 1947 it reached a conclusion?

A. Well, when you say "reached a conclusion" I would say more accurately reached some tentative ideas of what the surplus might be.

Bearing in mind that at that early date you had to guess at what the total grape crop might be, in turn, what portion of the raisin variety grapes might be converted into raisins, you had to guess or estimate, whichever you elect to call it, the potential of the different market outlets. In other words, what it might be possible to move into commercial trade channels, in domestic trade markets and to Canada, assess whether it might be possible in the way of moving supplies into export, giving you a whole series of variables but recognizing that even that series of variables, your guess on each individual one of them may not be entirely correct, you might have the good fortune of your estimates compensating or you might have the misfortune of your estimates accumulating. But despite those limitations on an early guess, as I recall it, we were "guestimating" that the probable quantity of raisins that the industry might need assistance on might go as much as a hundred thousand [1207] or even more than a hundred thousand tons, or it might fall below that.

But our general guess was around a hundred thousand tons.

Q. There was great uncertainty about that estimate, guess, or prediction, was there not?

(Testimony of S. R. Smith.)

A. Well, no one knew for a matter of fact or certainty what the raisin production would be, and of course that was not unique to that particular season. [1208].

* * *

Q. You have explained the crop estimates or surplus predictions which were made with respect to the expected 1947 raisin crop and surplus. Is it not fair to say—Well, strike "Is it not fair to say."

Have not these predictions, as a matter of fact, varied widely from the actual production and surplus from time to time on the basis of actual crops in your experience? A. Yes.

Mr. Dinkelspiel: If Your Honor please, before you answer, Mr. Smith, I don't see the value of this sort of testimony. We are dealing with a situation in 1947. If he asks the witness whether the prediction varied in 1947 from the result, I will withdraw my objection, but for other years, I interpose it.

The Court: I think the observation is well taken. The witness has said that his estimate of 1947 was fairly accurate in the light of all the factors at his command and I am only concerned with 1947. Whatever variables there may have been in other years, I am not interested in.

Mr. Fruit: Well, Your Honor, the fact is that we are here reviewing not just two contracts, but the administration of the program or programs of assistance to the raisin industry in 1947.

Now, that was not just one year alone without regard to [1209] experience and history, but it existed in context. We have been discussing at

(Testimony of S. R. Smith.)

great length crop predictions, programs and so forth. I think that since crop predictions have been brought in that it is proper to show how reliable they are.

Mr. Dinkelspiel: Your Honor, my disagreement with counsel is a basic one. I don't think we are in this case fundamentally discussing programs or discussing the theory of marketing or the theory of price support. We are discussing the obligations, if any, of the Government under a contract and that is our issue and we have tried to stick to it. When witnesses went afield, we can't help it.

Now, I object right now. We have spent forty or forty five minutes in getting a history from this learned gentleman of the support which the Government gives to crops which could easily have been stipulated to if it had any relevancy whatsoever in this proceeding.

Now, Your Honor granted the leeway, I refrained from making objections thereafter——

Mr. Fruit: May I say for the record, to clarify my theory of the case in the light of the exchange here that I would have been glad to conduct this as a straight contract case. I consider that it is and should be discussed as a straight contract case on the contract documents, but I feel that I have compelled to go beyond and to consider the [1210] programs carried on by the Government in this period, which, as I said before, do not exist as isolated facts.

If we are to determine the propriety that seems [illegible] one of the basic questions here of the decisions

(Testimony of S. R. Smith.)

made in those programs with respect to their origins and their changes, then we must understand them in the light of the experience and situation of the Department of Agriculture and the industry with which it was dealing immediately prior to and after this particular year.

Mr. Dinkelspiel: I don't think I have interposed any objections——

The Court: Counsel, I differ with you on your observations. I am interested in how, and in what manner they set up an asserted maximum of 61,000 tons at or about the time indicated. I am interested in whether the estimate of a hundred thousand tons was a fair estimate in the light of the attendant circumstances.

If the estimate of a hundred thousand tons was a fair estimate, I am not interested in the philosophy of the background nor all of the very quotients that may enter into 1941, 1942, '43 or '44. I think that is a fair observation on my part. You have already answered that the sum of a hundred thousand tons was a fair estimate, isn't that correct?

The Witness: Your Honor, I am not sure that I stated it that way. [1211]

The Court: That was my understanding of your statement. How did you state it?

The Witness: I related to the variables, Your Honor, that you have to take into account in arriving at an estimate, and after weighing those variable at an early date in season, we came out with a

(Testimony of S. R. Smith.)

tentative answer or conclusion, which, I stated was a figure of about a hundred thousand tons.

As I recall, I made no comment or observation as to my opinion as to the accuracy of that estimate.

The Court: All right, I will accept that statement. [1212]

* * *

The Witness: I am sorry, sir.

I said I have been sitting here in Court listening to testimony given, and there have been various references made to the estimates of surplus during the 1947 season, and in one of the presentations, as I recall it an exhibit, as a matter of fact attached to a letter addressed to me in 1948 by Mr. Dwight K. Grady, a tabulation purporting to show how an estimate of the indicated surplus for 1947 was arrived at.

Well, at that time the Industry was guessing that the production of raisins, Your Honor, would probably be 325,000 tons. I think the record will also show that certain Vegetable Branch in the presentation of a program docket to the Commodity Credit Board indicated a possible 1947 raisin production of 283,000 packed processed tons which, if my arithmetic is correct, would give you an answer of around 303,000 natural condition tons.

I also point out that the official crop reporting service of the Department of Agriculture in December of 1947 estimated the production of raisins for that year to be [1213] 325,000 tons.

By July of the following year, July, 1948, it had

(Testimony of S. R. Smith.)

reduced that estimate to 310 or 315 thousand tons, but it eventually corrected production figures for that year, it reported about 306,000 tons.

I might note that the estimate the Fruit and Vegetable Branch made of a possible movement of supplies into commercial trade channels, domestic as well as Canada for the 1947-48 season was likely to be 180,000 tons. That figure, it happened, included what carry-out might be in the hands of packers at the conclusion of the season.

There is variation between that figure and what actually transpired constituting upwards of 20,000 tons or more, all of which I merely cite as bearing on the difficulty of making estimates.

But despite all those difficulties, Your Honor, we still make them. [1214].

* * *

Q. (By Mr. Fruit): Did you go before the Commodity Credit Corporation Board in July, 1947, and tell them or discuss with them the prospects for the need of assistance by the raisin producers in the 1947 crop season?

A. As I remember it, I did. [1215].

Q. Will you tell the Court what you told the Board, as well as you remember it at that time?

A. My purpose, first of all, for going to the Board and reporting on the prospective 1947 raisin season was prompted by my having plans to come out here to California and meet with the various dried fruit crops—dried fruit groups including the packers, with a view of obtaining first hand their ideas and suggestions as to what might be done,

(Testimony of S. R. Smith.)

and also by that process getting some assessment of the temperament which the producers, as well as packers were in.

I related to the Board what our opinion was up to that time as to problems in prospect, and discussed with them what the Department might do to aid in the disposaf of the supplies in prospect if they materialized, and asking them for guidance and direction in the conduct of my discussions with the Industry groups while I would be out in California. [1216].

* * *

The Court: What was the exchange between you and the members of the Board?

The Witness: The attitude expressed by the members of the Board was that we shouldn't plan on developing a program which would call for underwriting any of these dried fruit crops at a specified level. That my aspirations in terms of the mechanics that might be employed, I would say the Board limited considerably. The prospect of buying by the Commodity Credit Corporation in anticipation of foreign relief feeding needs, they had reservations about that, stating however, that that was not a closed possibility but that in addition use of Section 32 authority to facilitate exports requiring supplies for distribution to schools and [1217] institutions were additional measures that might be considered in my discussions with industry [1218] groups.

* * *

(Testimony of S. R. Smith.)

Q. (By Mr. Fruit): When did you meet, to the best of your recollection, with the raisin producers?

A. I held a series of meetings between the first and the 8th of August, 1947.

As I recall it, I had two meetings with raisin producer groups, and I had one meeting with dried fruit packers which would include raisin packers. The dates in meeting with the raisin groups, as I remember it, were, I think the 1st and the 8th of August. I can't be positive of those dates.

Q. You met with them that period, from the 1st to the 8th of August then, with prune, peach and raisin, possibly other dried fruit producers and dried fruit packers, is that right?

A. That's right.

Q. Did you discuss with them the raisin crop prospects for 1947? A. I did. [1219]

* * *

The Court: I take it you were in formal hearings with individuals comprising the Industry?

Q. (By Mr. Fruit): Were these formal hearings, Mr. Smith?

A. No, they were not.

Q. What were they?

A. They were meetings that were arranged in advance with groups who had expressed an interest and a desire in meeting with representatives of the Department to discuss their problem and what they would like to see the Department do about the problem.

(Testimony of S. R. Smith.)

Q. Well, specifically to the best of your recollection let me direct your attention to the meeting with the raisin producers. Did you hold more than one meeting with the raisin producers?

A. I remember holding one. My recollection of that is very distinct and clear.

Q. Where was that meeting held?

A. In the Palace Hotel, San Francisco.

Q. Do you remember the date of that meeting?

A. To the best of my recollection, it was, I think August 1st, but I am not positive.

Q. Do you remember what raisin producers were present?

A. Oh, there was a rather large crowd. I couldn't, Counsel, undertake to try and name all persons present. I recall a [1220] few of them who were present, but to name all of them, I couldn't.

Q. Well, will you name those whom you remember?

A. Well, the gentleman who was acting as Chairman for the grower group was Mr. A. Setrakian. There were some individuals not directly associated with the raisin industry present also. I remember Dr. Harry Wellman, then associated with the Giannini Foundation was present, but the great majority of the persons in attendance, it was a luncheon meeting, were raisin producers who had come up from the San Joaquin Valley to attend the meeting.

Q. If you remember, please tell the Court what you told the producers on that occasion?

A. I was called upon shortly after finishing

(Testimony of S. R. Smith.)

lunch to relate to the group what assistance raisin producers could expect from the Department of Agriculture. I outlined to them that the Department was willing to give consideration in extending assistance through Section 32 by acquiring supplies under that authority for distribution to schools and institutions and different consideration to a commercial export payment program; that there was the possibility of acquiring supplies for use in foreign relief feeding, and feeding in occupied areas.

I did state that the magnitude and nature of acquisitions for the latter purpose were not definite, were a matter of [1221] conjecture because as of this date the potential that those outlets actually proved to be subsequently was not indicated.

Q. Do you remember your meeting with the dried fruit packers? A. Yes.

Q. Do you remember the date of that?

A. That was toward the end of the series of meetings that I had held, as I remember, on or about—I'd say around the eighth of August, [1222] 1947.

Q. Where was that? A. 1947.

Q. ——if you remember?

A. That was a luncheon meeting also at the Palace Hotel in San Francisco.

Q. Were a great many packers there—just a few?

A. Oh, I don't recall that I counted them; in

(Testimony of S. R. Smith.)

the neighborhood of ten or a dozen, but I can't be sure of that.

Q. Can you name those whom you remember as having been there?

A. There are two individuals that I recall being there. I can't name all of them.

Q. Whom do you remember?

A. One individual who I recall being there was Dwight Grady. As I remember it, Charlie Griffin was there from California Packing Corporation, some of the packers from Fresno, and some of them from the San Joaquin Valley were present.

Q. Tell the Court what you told the packers.

A. What I outlined to the packers which—I covered the same ground with them as I had with the producer groups, and asked as to the measures of assistance which the Department of Agriculture was giving consideration to. If you want to, I can reiterate them, but it would be the same as I just previously outlined as having covered when I met with the raisin producer group. In other words, I didn't vary my story as between packers and [1223] Growers.

* * *

Q. (By Mr. Fruit): Mr. Smith, you were testifying that you had told the packers substantially the same things that you told the raisin producers. Very briefly, did you or did you not tell the packers that the Department of Agriculture or the Commodity Credit Corporation would purchase any size the quantity of raisins?

(Testimony of S. R. Smith.)

A. No, I did not. I was not in a position to make any statement on that subject.

Q. Did you tell them what any specific program operations would be by the Department of Agriculture or the Commodity Credit Corporation?

A. At that time I was merely in the process of exploring the possibilities with nothing definite on my part as to what might be done.

Q. Well, did you tell the packers the extent, if any, to which Commodity Credit Corporation could be expected to support prices or remove surplus?

A. The subject of whether the Department would undertake a price support program in the sense of underwriting a specific level of prices, I expressed an opinion on that, and indicated that I seriously doubted whether the Commodity Credit [1224] Board and Secretary of Agriculture would approve such a program, and I recall that——

* * *

A. (Continuing): In the meeting with packers, after outlining, as I stated previously, the subject matter, I was in a position to cover as to possible Department of Agriculture assistance, the reaction from the group, I sensed as being rather pessimistic as to the prospects of assistance from the Department, and which pessimism prompted me to make an observation of this nature, that even though their reactions were on the [1225] skeptical and pessimistic side, I was taking it upon my own to indicate that in my opinion the Department of

(Testimony of S. R. Smith.)

Agriculture would not let the grower price situation go to pot.

Q. (By Mr. Fruit): Mr. Smith, I hand you Plaintiff's Exhibit No. 6, a copy of a wire to you from Dwight K. Grady, dated September 9, 1947. Do you recognize that? A. Yes, I do.

Q. I hand you Plaintiff's Exhibit No. 8, copy of—withdraw that question.

I hand you Plaintiff's Exhibit No. 7, copy of a letter dated September 10, 1947, to you from Mr. Grady on behalf of Rosenberg Bros. & Co. Is that a copy of a letter you received shortly after the stated date? A. It is.

Q. I hand you Plaintiff's Exhibit No. 8, a copy of a wire from you to Mr. Grady dated September 12, 1947. Do you recognize that? A. I do.

Q. In your wire to Mr. Grady you concluded, and I quote:

"We solicit and except receive cooperation Rosenberg and other packers in making it a success."

What did you mean by the term "cooperation"?

Mr. Dinkelspiel: Your Honor please, the document will speak for itself. We have Secretary Anderson's interpretation [1226] sought, we have this witness' interpretation of his language sought.

The Court: I think with respect to language which has a definite and established meaning we shouldn't have any quarrel about it with words of art or colloquial expressions that may have a custom or trade usage. That is another matter. But I

(Testimony of S. R. Smith.)

think we may assume in this case they were used in the sense in which ordinarily they are used.

Mr. Fruit: Well, in a raisin——

The Court. Unless, of course, there is some reason not apparent to me. I don't know.

Mr. Fruit: Well, Mr. Grady has stated that in his opinion they did cooperate. I believe there is some difference of agreement on that which I am trying to develop, sir. The term is not, in this context, a term of art. It is a very general term which has no specific meaning, certainly in this context. It is, I submit, not unequivocal nor ambiguous here. This has been cited as almost compulsion by Mr. Grady in his testimony. That is, this solicitation of cooperation.

Mr. Dinkelspiel: I call attention to——

The Court: Well, I suppose there are refinements and upon refinements we could go into the —the Senator refers to Rosenbergs as the bellwethers; Rosenbergs assumed to take a position according to their testimony that would [1227] indicate cooperation with the government in attempting to stabilize conditions in the valley.

If you feel that this answer will give me any light or shed any additional clarity to the record I will permit it. There is no objection.

Do you have any answer, Mr. Smith, that might give me some aid?

The Witness: I think so, Your Honor. But—the last sentence and word "cooperation" I personally think have to be considered as a part of the

(Testimony of S. R. Smith.)

whole answer, and in recognition of my message, being in answer to a specific wire that I received from Mr. Grady. I don't think that they can be treated separately. My answer was directed at the proposal which he submitted in his wire to me. I was addressing a wire, in turn, to him, whom I know and did know then very well, and I was conscious, realized that Mr. Grady had some very definite views on how government activity should be conducted with the Dried Fruit Association, but as far as the meaning of cooperation in this instance was concerned, if I may be permitted to say, it reflected two thoughts. "Let's quit fussing about what has been announced in the way of a program and recognize that the Commodity Credit Corporation is elected to use the packers as a vehicle through whom aid to producers was to be accomplished and to effect that objective packers, including Rosenberg, should get out and get busy and buy raisins. [1228]

* * *

Q. (By Mr. Fruit): Mr. Smith, between September 5, 1947, and October 15, 1947, did Mr. Dwight Grady ever ask you if the government or the Commodity Credit Corporation would buy more than 61,000 tons of raisins in the 1947 crop year?

A. I have no recollection of Mr. Grady asking me such a question.

Q. Did anyone else connected with Rosenberg Bros. & Co. ask you that question?

A. I have no recollection of any such question

(Testimony of S. R. Smith.)

Q. Did anyone not connected with Rosenberg Bros. & Co., Inc. but in the raisin industry ask you that question?

Mr. Dinkelspiel: That question I object to. It can hardly bind us, Your Honor.

The Court: Sustained.

Mr. Fruit: Your Honor, if I may briefly ask for reconsideration of that ruling for this reason. [1236]. Plaintiff's Exhibits Nos. 6 and 7 begin in this way. Plaintiff's Exhibit 6 says:

"Have just discussed by telephone with Ted Kluge his conversation with you respecting prune program and have checked with several others as to procedure best calculated to avert unfavorable reactions in recently announced programs for purchase prunes and raisins."

Plaintiff's Exhibit 7 says at the beginning:

"Late last evening I sent you a telegram at the suggestion of Ted Kluge suggesting procedure that might stop some of the squawking you hear, particularly in the San Joaquin Valley, which seems to have gone very pessimistic."

Those are the exhibits, you will recall, evidencing Mr. Grady's communications with Mr. Smith with respect to the program as announced in the press release.

Now, the question I have asked would tend to prove that Mr. Smith did tell Mr. Kluge that the government might conceivably buy more dried fruits, not necessarily raisins, but dried fruits than the

(Testimony of S. R. Smith.)

quantities announced in the press release announcement.

The Court: You may answer, Mr. Smith.

A. I recall receiving a telephone call from Mr. Kluge, and among the questions that he asked me was whether I had any [1237] information or could give him any idea of whether the Department would confine its purchases to those specified in the press release issued by the Secretary from Albuquerque, New Mexico.

My reply was that I was in no position to tell him or anybody else whether or not the Commodity Credit Corporation would buy more than the quantities stated in that press release.

Mr. Dinkelspiel: Your Honor please, I move to strike the witness' answer on the ground that it can in no way be binding on the plaintiff in this action. I will make one qualification. I will withdraw the motion if counsel ties it in as communicated to Mr. Grady or anybody at Rosenberg Bros. & Co. That is the only way it could possibly be relevant to this proceeding, a communication between this witness and somebody not related to the plaintiff in this action.

So I move to strike it—and, who, incidentally, by his own testimony, doesn't handle raisins.

The Court: Is there any evidence that Mr. Kluge conveyed it to——

Mr. Fruit: Well, I read the portions of the two exhibits. To repeat again, the first sentence of Plaintiff's Exhibit No. 6 says: "Have just dis-

(Testimony of S. R. Smith.)

cussed by telephone with Ted Kluge his conversation with you respecting prune program and have checked with several others as to procedure [1238] best calculated to avert unfavorable reactions in recently announced programs for purchase prunes and raisins."

The next exhibit, Plaintiff's Exhibit 7, the follow-up letter of September 10th says:

"Late last evening I sent you a telegram at the suggestion of Ted Kluge suggesting procedure that might stop some of the squawking you hear, particularly in the San Joaquin Valley which seems to have gone very pessimistic."

Now, Your Honor, I stated that this would tend to prove communication with Mr. Kluge.

In the light of these exhibits I think this conversation may well be material. What weight you wish to give it is another question and should not, I suggest, be determined at this time. I do think that I should attempt to get from the witness his recollection of the date of this conversation.

Mr. Dinkelspiel: I interpose the same objection, Your Honor, and I add further that this is not a matter of weight. You can't give any weight, I respectfully suggest, to that which passes between two strangers to a transaction.

The Court: Well, I suppose that based upon the fragmentary reading of those sentences that the inference might be drawn that this conversation had some relationship to those particular matters, and it is pure inference and speculation.

(Testimony of S. R. Smith.)

I take it Mr. Dwight Grady is available? [1239]

Mr. Dinkelspiel: I have already checked with him, Your Honor. We will offer him in rebuttal and put this thing at rest, but it hasn't been tied in yet.

The Court: That would seem to be the place to offer it. All right, the motion is denied.

Q. (By Mr. Fruit): Will you tell the Court, to the best of your recollection, the time of your conversation with Mr. Kluge?

Mr. Dinkelspiel: Same objection, Your Honor.

The Court: Overruled.

A. To the best of my recollection, it was either the evening of September 5 or September 6. It was immediately following, within a day or two, as I remember it, the September 5 announcement by the Secretary. [1240]

* * *

Q. (By Mr. Fruit): Was there a decline in the raisin market in October, 1947?

Mr. Dinkelspiel: If you know, sir.

The Witness: The decline in the raisin market started, as I remember it, around the middle of September and continued to decline on to the latter part of October, reaching a level of some $110 to $115 a ton for natural Thompson Seedless raisins.

Mr. Fruit: It reached that level at some time in that period. You are not testifying that it reached that level during the entire period?

A. No, I am not.

Mr. Dinkelspiel: Are you testifying, counsel?

(Testimony of S. R. Smith.)

Q. (By Mr. Fruit): Do you know what caused the decline in the market?

A. I have my ideas and conclusions as to what contributed to that decline.

Q. Will you tell the Court what those ideas and conclusions are?

A. In my opinion, one of the important contributing factors to the decline in the market field price on natural Thompson Seedless Raisins during that period was lack of [1242] active buying on the part of raisin packers.

* * *

Q. (By Mr. Fruit): Was the Rosenberg bid upon the contract for 10,000 tons of raisins to be sold to the Government, Plaintiff's Exhibit No. 10, the offer having been submitted on September 17th, 1917, was that bid, do you know, below the market level at the time of the bid?

Mr. Dinkelspiel: If Your Honor please, I submit that the question is objectionable in its present form in that we have been talking, I believe, about natural raisin prices at $110 and so on, and now the Rosenberg bid is $151. If the question is being framed—I am not going to object to it because it puts the defendant in the delightful spot of objecting to a bid that is too low, and the Secretary of Agriculture refusing to let the plaintiff renegotiate that bid because he had too good a profit. I don't know which side of the fence the Government is on at the moment.

(Testimony of S. R. Smith.)

Mr. Fruit: Is this an objection or argument?

Mr. Dinkelspiel: Further, Your Honor, I would like the witness first to testify as to what the market is, because I submit that a bid for ten thousand tons is pretty close [1243] to establishing a market.

Mr. Fruit: Well, let me qualify the question, then, Mr. Smith.

Q. (By Mr. Fruit): Assuming, as has been testified by Mr. Grady, that their bid price of approximately $150 a ton was predicated upon the assumption that they could buy natural condition Thompson Seedless raisins at from $110 to $115 a ton was their bid as thus computed with respect to natural condition Thompson Seedless below the market at that time for natural condition Thompson Seedless raisins?

A. If I remember at the time at which that bid was made or the offer tendered, the field price on Thompson Seedless raisins, natural condition, was reported at $125 a ton.

Mr. Fruit: Thank you. Would the Court care to entertain a recess at this time?

The Court: Yes. There is one question that I should like to have clarified before we pass the subject of the alleged failure of the processors to enter the market with any bids. Will you be more specific, Mr. Smith, with respect to the precise time when, as you asserted, the failure was manifest on the part of the processors?

The Witness: I am talking, Your Honor, about at a period just preceding acceptance of the first

(Testimony of S. R. Smith.)

awards and the time of submitting the second offer which would take us through the period of from the middle of September through [1244] to the middle of October.

The Court: When was the announcement made with respect to the Government indicating that it would go into the market and purchase from growers?

The Witness: As I recall, Your Honor, that announcement was made October 14, 1947, and clarified announcement, press release, October 17.

The Court: And when, according to your best recollection was the Industry; I mean by "the Industry" the growers' industry—first notified officially or unofficially of the fact that the Government would go into that market?

The Witness: At what period of time, Your Honor?

The Court: Yes, about what period of time? Was it prior to October 14th, or according to your best recollection, did they first have notice and knowledge on or about October 14th?

The Witness: We have reference to—I am not sure that I understand you, Your Honor—reference to announcement of the increased quantity?

The Court: Yes.

The Witness: Whether, or to what extent growers or others had knowledge about increasing the total purchases beyond 61,000 tons prior to October 14th, I cannot say, sir.

The Court: The point I had in mind is whether

(Testimony of S. R. Smith.)

any unofficial pronouncements or unofficial notices were given [1245] to the growers.

The Witness: Yes, there was talk about a change in program being under consideration prior to that date.

The Court: And when, according to your best recollection was that talk first manifested?

The Witness: Two or three days prior to October 14th.

The Court: Did you participate in those conversations?

The Witness: Sir, I did not participate in any conversations beyond the 8th of October, because I was not in Washington during the period of time I indicated earlier. [1246]

* * *

Q. Mr. Smith, did you submit the docket providing for the purchase of 133,000 tons of dried fruits, including 61,000 tons of raisins, being the quantities referred to in Secretary Anderson's press release announcement of September 5, 1947, to the Board of Commodity Credit Corporation?

A. I did.

Q. You remember about what time you did that?

A. I think it was presented at a meeting of the Board on or about August 27.

Q. Did you or did you not at the same time submit a docket for export payments? [1255]

* * *

(Testimony of S. R. Smith.)

A. I did.

Q. (By Mr. Fruit): Will you tell the Court briefly what the export payment docket provided for?

Mr. Dinkelspiel: Your Honor please, I object to the question, incompetent, irrelevant and immaterial, not within the issues of this case, and if it is relevant the docket itself should be produced and presented to the Court. I object to this witness testifying to secondary evidence.

The Court: Where is the docket, or copy thereof?

Mr. Fruit: I must admit we do not have it.

Mr. Dinkelspiel: Isn't that a strange way of examining?

Mr. Fruit: Your Honor, we are not interested in the actual terms and details of the docket. We admit it was not, as a docket, submitted to the industry or to these people; simply trying to get the outline of it. [1256]

* * *

The Witness: In substance the docket provided for the payment of $40 per ton on packed processed raisins shipped in export up to a maximum of 80,000 tons.

Q. (By Mr. Fruit): Were those dockets both submitted by you at that time for adoption together? A. They were.

Q. Were both of them adopted?

A. They were not.

Q. We know that the direct purchase docket was

(Testimony of S. R. Smith.)

adopted; that is in evidence. Was the export payment docket not adopted? A. It was not.

Q. What action was taken on it, if you know?

A. Action was deferred on it.

Q. Was that docket ever adopted?

A. It was not.

Mr. Dinkelspiel: I move the witness' testimony be stricken now, Your Honor. It is obviously incompetent, irrelevant and immaterial to these proceedings, a docket not even adopted is brought before the Court.

Mr. Fruit: Let me say this: It is the only way I can answer you the question at the moment factually that you asked this morning.

The Court: I can't quite follow your theory. I'll strike the testimony, counsel. [1260]

* * *

Q. (By Mr. Fruit): Mr. Smith, I hand you Plaintiff's Exhibit No. 38, copy of a letter dated February 26, 1948, addressed to you from Rosenberg Bros. and presenting for your consideration a claim with respect to their alleged losses in connection with these contracts. You remember that letter?

A. I received a letter such as this, yes.

Q. Did you approve or deny the claim presented in that letter?

A. The claim was denied.

Q. By you? A. Yes.

Q. Why did you deny it?

(Testimony of S. R. Smith.)

Mr. Dinkelspiel: Well, if Your Honor please, I think the facts must speak for themselves. I don't think the witness' reasons are important. Object to the question on that ground.

The Court: Overruled. [1261]

A. My reasons fell into two categories. The first related to the presentation of the facts bearing on the claim itself. The presentation, as I recall it, related the conditions and circumstances which transpired during the course of the 1947-48 raisin season only up through the close of the calendar year 1947, as I remember it, and not undertaking to relate in any way that which transpired from that date until the close of the 1947 marketing season.

It was my views —

Mr. Dinkelspiel: May I interrupt? I got mixed up on the dates there. Was it 1947 he said?

The Witness: The close of the 1947 season.

Mr. Dinkelspiel: I don't follow it, but the witness can go ahead. I don't care.

The Witness: The impact of what occurred in the raisin market following the turn of the year, January 1, 1948, in my opinion was an important factor to be weighed in arriving at a conclusion as to the extent, if any, that the party was alleging. In other words, in the aggregate, as far as the season was concerned, it appeared to me that there were opportunities for the petitioner to acquire raisins at a price which would permit them to meet

(Testimony of S. R. Smith.)

the contracts that they had entered into with the Commodity Credit Corporation.

That is a broad outline of the first category to which [1262] I made reference.

The second basis or reason, the claim after having been submitted to me, copies were submitted to our solicitor's office, and rendering my final decision incorporated in my letter addressed to Mr. Grady, it reflected the fact that I was advised that from a legal standpoint our solicitor's office was of the opinion that we had no obligation as far as the contractor was concerned. [1263]

* * *

Cross-Examination.

By Mr. Dinkelspiel:

Q. Mr. Smith, His Honor has just read that last letter. I have the original of it here and I want to ask you if these were your words:

"This is in reference to your claim involving contracts nos. A6PM ff-1647, and A6PM ff-1897 in connection with the Department's purchases of raisins from you under its dried fruit purchase program, the general plan of which was announced by the Secretary of Agriculture on September 5, 1917, and the terms and conditions of which were more specifically announced in Announcements Nos. 1 and 2, respectively, on September 10 and October 1, 1917, by the Berkeley, California, office of the Fruit and Vegetable Branch."

(Testimony of S. R. Smith.)

Those words were written or dictated by you, were they?

A. Sir, I stand responsible for the language and by virtue of my signing it, I constitute it being my language, although the actual composition of the letter was not done wholly by my own hand.

Q. Did the Solicitor have a hand in it, Solicitor's Office?

A. If I remember correctly, I had the assistance of the Solicitor's Office in drafting this letter. [1264]

Q. Yes, and both you and the Solicitor's office have referred to this as a dried fruit purchase program. That is a proper designation, is it?

A. That was a common method of referring to the program, sir.

Q. And the plan of which was announced by the Secretary of Agriculture on September 5, 1947.

Mr. Frant: I object. That is not an exact quotation of the letter.

Mr. Dinkelspiel: That is an exact quotation.

Mr. Frant: The general plan, not the plan.

Mr. Dinkelspiel: "The general plan of which was announced by the Secretary of Agriculture on September 5, 1947."

Q. (By Mr. Dinkelspiel): Is that yours and the Solicitor's understanding how the program went into effect, was first started?

A. The program as such in terms of operation were not started by the press release, sir.

Q. They were not? A. No.

(Testimony of S. R. Smith.)

Q. What were you referring to then, in this letter?

A. Referring to the Secretary's press release.

Q. That is Exhibit 4 in Evidence, right?

A. Yes, this is a copy of the press release. [1265]

Q. Then, is it a correct or an improper statement by you and the Solicitor that "the general plan of which the dried fruit program was announced by the Secretary of Agriculture on September 5, 1947?"

A. Yes, I stated that.

Q. That is correct, is it not?

A. I stated that, and I believe it to be true.

Q. And also that the terms and conditions of which were more specifically announced in Announcements Nos. 1 and 2 respectively on September 10 and October 1, 1947, that is correct, too, is it not?

A. The specific program provisions are incorporated in the invitations for offers, the first one of which was issued, I think September 10.

Q. Now, the letter was sent, I take—by "the letter"—I mean this letter of October 13, 1949 rejecting the claim under the advice of and with the cooperation of the Solicitor's office, isn't that correct, Solicitor for the Department of Agriculture?

A. As I stated previously, Counsel, a part of my considerations was the advice and counsel I got from the Solicitor's Office.

Q. Let me ask you something as man to man. If you had had an opinion that the claim was well

(Testimony of S. R. Smith.)

founded and your lawyer told you that it wasn't, would you or would you not [1266] have rejected it?

A. Will you restate that question, please?

Mr. Fruit: Object to that as incompetent, irrelevant and immaterial.

Mr. Dinkelspiel: He said he had two reasons, Your Honor. I am trying to determine which was the motivating reason. One reason was that he thought Rosenberg Bros. in substance could have covered under their contract. I will come to that in a minute. The other was that he had been advised by his lawyers to reject.

Q. (By Mr. Dinkelspiel): Now I am just asking you, Mr. Smith, whether or not——

Mr. Fruit: Has the Court ruled on my objection?

Mr. Dinkelspiel: I will reframe the question.

Q. (By Mr. Dinkelspiel): I am asking you, Mr. Smith, whether it is not not true that it was the opinion of the Solicitor that you reject this claim which controlled your decision to reject it?

A. I will answer you as the decision, as far as I am concerned actually took place in terms of time sequence.

Q. You mean by that first you determined it should be rejected, and then the Solicitor confirmed that, is that what you mean?

A. No, I haven't said that.

Q. Well, explain it, will you? I am not trying to put [1267] words in your mouth?

(Testimony of S. R. Smith.)

A. I weighed the pros and cons of the claim myself. The matter of legal issues involved, as I remember extended over quite a period of time. The record will show that the elapsed period—elapsed interval between the time the claim was submitted to me and the time that I replied to it, something over a year elapsed. But I submit, sir, that my views wholly from an operational standpoint were one thing, and the opinion and advice of our Solicitor's office was another.

It so happened that, they were both negative answers.

Q. And the letter that went out which is Defendant's Exhibit I was prepared, if I understand your answer, your previous answer correctly, by the Solicitor, either alone or in cooperation with you, which was it?

A. No, they assisted in the drafting of the reply which I made.

Q. I had a little trouble before understanding you, whether you meant that when you took responsibility for this letter you hadn't actually prepared it, but you were asserting that you would take the responsibility for it?

A. No, as a matter of fact I personally did not prepare the letter.

Q. And it was prepared, was it not, by or in the Solicitor's Office? [1268]

A. Sir, as I recall the facts of the matter, one of my associates working on this problem took the initiative in the development of the letter. My asso-

(Testimony of S. R. Smith.)

ciate, I refer to an associate in the Fruit and Vegetable Branch and not in the Solicitor's Office.

Q. What is his name please?

A. He was a deputy of mine. His name was C. F. Kunkel. He was a Deputy Director.

Q. He was not in Court here; is he?

A. No, he has since retired from the Service.

Q. Then, what do you mean, if you will explain, about the part "Solicitor's Office took part in the preparation of this letter"?

A. I don't think I understand your question, sir.

Q. Well, Mr. Smith, I will try to make it simpler.

What part, to your knowledge, did the Solicitor's Office take in the preparation of this letter, Defendant's Exhibit I? There is no mystery about it, is there?

A. Nothing to my knowledge and recollection that assisting in drafting of it, sir.

Q. I thought your Deputy drafted it?

A. He took the initiative I said, sir.

Q. How do you know? Did you see him doing it?

A. I gave him the assignment and he reported back to me, sir. [1269]

Q. And what did you say in giving him the assignment?

A. That I wanted him to prepare a reply and get the assistance of the Solicitor's Office in its preparation.

Q. Was that before or after you had received

(Testimony of S. R. Smith.)

your second reason, as you said before, for rejecting the claim, namely the opinion of the Solicitor's Office?

A. It was after.

Q. All right, sir. So this document was prepared by your associate in cooperation with the Solicitor's Office after you had received the advices of that office that the claim was not legally sufficient?

A. That is correct.

Q. Now, you also had an opinion, I understand from your prior testimony that—if I quote you correctly, if not correct me—that in the aggregate, as far as the season went, Rosenberg Bros. could have acquired raisins to meet the Government contract without suffering loss, is that a correct statement of the other reason?

A. I don't think that I put it that way, quite.

Q. Well, put it in the proper way then.

A. That by virtue of the nature of the presentation the entire operations for the 1947 crops season were not covered, and not having the information from the contractor covering an entire season's operations, we were not in a qualified position to determine how they came out on an [1270] overall season basis.

Q. So you didn't know whether they had suffered a loss?

A. In fact, no. Neither did they, in their presentation, in my opinion, present facts which would establish that they had a loss.

Q. So you are saying now that you rejected the

(Testimony of S. R. Smith.)

claim because they had not shown a loss; is that correct?

A. In my judgment they had not, that is correct.

Q. What is the reasoning back of it? It is a very dangerous to ask on cross-examination, but I think with your honesty I will ask you to tell me.

A. I will answer it honestly to the best of my ability.

Q. Tell me, what was the reasoning in back of it?

A. All right, sir. We have already had placed in evidence, sir, a record of the price behavior on natural Thompson Seedless raisins prevailing at the producer level. As I recall the Market News Report which you introduced, the record of prices stops with the fore part of September, extends on into May and June, I think.

Following that record of prices, if I remember correctly, those prices went through at least two cycles of up and down, and as I remember the presentation in the claim, the reference and facts presented related only to the period up to sometime in December, as I recall it, and following December, the Market News Record will show that toward the [1271] end of that month and the fore part of January, grower prices on natural Thompson Seedless raisins declined very materially, they having reached a peak as reported there of somewhere around $140 about the middle of November. They declined by the end of January to level of $110 to $115 and subsequently actually declined somewhat below that, and they remained at a level of $110 to

(Testimony of S. R. Smith.)

$115 a ton through February, March, and as I recall it, into April. It is that period that I had particular reference to in making my earlier statement.

Q. That action of yours was somewhat in contradiction, was it not, to your recommendations made in your communication to the Administrator by your letter of October 25 when you suggested, as His Honor was noting from your memorandum yesterday, that some relief be granted the packers by renegotiating price. That was quite a change in position, was it not?

A. It was, sir.

Q. And that change of position was brought about, to summarize it, by your conclusion that Rosenberg Bros. hadn't suffered damage. Now isn't that all there is to it?

A. I haven't so testified.

Q. Well, I am asking you whether that isn't all there is to it?

A. No, no. I consider the memorandum which I submitted to [1272] the Administrator of the Production and Marketing Administration and which was presented to the Board of Directors of the Commodity Credit Corporation, a true and honest effort on my part to reflect what, based on the information available to us at that time, the market condition with respect to raisins was and I call your attention to the fact that that memorandum was dated October 23, 1947.

Q. That's right, sir. Prior to which time, two contracts had been entered into, isn't that correct?

(Testimony of S. R. Smith.)

A. That is correct.

Q. And you were looking at the effects, then, anticipated and then actually in effect of the change of the Government's position upon those two contract at that time?

A. Sir, I can truthfully say and support by reference to the memorandum itself that that memorandum was not primarily motivated by the position that packers found themselves in. It was a collateral situation.

My basic reasons for submitting the memorandum, the proposal that I did summarize in the last paragraph of the memorandum.

Q. Now, Mr. Smith, this memorandum which I understand you stand by, did recommend the renegotiation of the existing contracts. It has been established in evidence, particularly by Plaintiff's No. 49 which is the minutes of the proceedings of the Commodity Credit Board that your recommendations were [1273] rejected, is that correct?

A. That is correct.

Q. And isn't it true that the rejection of your recommendations was made on the advice of the Solicitor for the Department of Agriculture?

A. To my knowledge, they were not, sir.

Q. Would you state that you have no knowledge on the subject whether or not the proposals for renegotiation were rejected on the advice of counsel for the CCC and the Secretary of Agriculture?

A. Sir, there was a series of peculiar circumstances surrounding my own position at that time.

(Testimony of S. R. Smith.)

Q. Well, couldn't you answer me yes or no and then proceed? I mean, if you don't know about it, I am not going to press it further.

A. I will answer you this way. I was not aware of a legal opinion that the contracts could not be renegotiated.

Q. I think Senator Anderson covered that point, Your Honor, if I am not mistaken. When you came to the conclusion in 1949 that Rosenberg Bros. hadn't suffered any damage and could have made deliveries, did you have before you any information as to Rosenberg's obligations under civilian sales contracts? A. I did not.

Q. Did you know, Mr. Smith, that preceding this Government contract of September 23, Rosenberg Bros. had had commitments on civilian sales including export sales of 14,449,000 pounds?

A. I don't remember all the details that were presented in the petition itself, but as far as——

Q. Well, I——

A. Let me answer you. But as far as the information that I had and available to me with respect to Rosenberg Bros. operations per se were contained in what they submitted in the claim.

Q. All right. If it appears, and it certainly will appear that the reference to that 14 million dollar figure is not in the claim, you would not have had any information with respect to it?

A. Well, in terms of specific figures, no, but I

(Testimony of S. R. Smith.)

would say that I would accord myself the privilege of concluding that they had a business in regular commercial channels.

Q. Sure, but there is a difference between one million dollars, let's say, and fourteen million dollars. You didn't know what the difference was, did you?

A. No, that is correct.

Q. Let's be sure on that subject, shall we?

A. Oh, yes.

Q. Let me ask you this: Did you know that the cost of raisins to Rosenberg Bros. acquired in order [1275] without interruption after they had satisfied their civilian commitments prior to the Government commitments averaged $134.16 per ~~ton~~ or .06708 cents per pound?

Mr. Fruit: I object. That question embodies facts not in evidence except as a computation based upon a theory of damages.

Mr. Dinkelspiel: Which is evidence.

The Court: Objection overruled.

The Witness: Sir, I wish to restate that the only specific information that I had with respect to Rosenberg Bros. & Co.'s operation was the information and computations contained in the submitted claim.

Q. (By Mr. Dinkelspiel): I have one more question on that, then I will get to another.

Did you know that the further commitments of Rosenberg Bros. under civilian sales and under contract 1893 required to be fulfilled before—no

(Testimony of S. R. Smith.)

the total civilian commitments prior to the date of the second contract plus the commitments under the first contract was over 40,000,000 pounds? Did you know that?

A. I didn't know it unless it was represented in the Petition. [1276]

* * *

Q. (By Mr. Dinkelspiel): During the recess at my request, Mr. Smith, you looked through Plaintiff's Exhibit 38, which was a claim presented to you and which was rejected by your letter, Defendant's Exhibit I in evidence. This is dated February 26, 1948. I asked you to ascertain whether there was any reference in here to the civilian commitments of Rosenberg Bros. & Co. or the purchase of raisins to meet civilian commitments. Have you satisfied yourself whether there is or is not any reference in this?

A. Yes, I have satisfied myself that there is no reference in the submittal to the civilian trading as far as Rosenberg Bros. & Co. is concerned.

Q. Then in reaching your conclusion that Rosenberg Bros. & Co. was, as you state, Rosenberg Bros. could have acquired raisins to meet the government contract without loss to itself, you did not have before you the facts with reference to the Rosenberg Bros. & Co. civilian commitments or the fulfillment thereof?

A. I had the information in the submittal which related to, among other things, the acquisitions of Rosenberg Bros. of Thompson Seedless raisins.

(Testimony of S. R. Smith.)

Q. I don't understand you by the word "submittal".

A. Or the claim.

Q. What?

A. In the claim submitted. [1280]

Q. Well, my question was directed to whether you had before you any information with respect to Rosenberg Bros. civilian commitments and how they were met.

A. My answer to that is that I did not. [1281]

* * *

The Court: I take it that the $40 is approximately the differential, is that correct?

Mr. Fruit: Yes. My statement is merely for the purpose of fully identifying the document because it is work papers, so it is identified completely.

The Court: All right.

Mr. Fruit: It is the Fruit and Vegetable Branch tabulation under Mr. E. M. Graham's supervision of the bids submitted by the packers under Announcement No. 1 which was issued on September 10, 1947, and this tabulation is, as I said, simply that and nothing more.

The Court: All right.

Q. (By Mr. Dinkelspiel): Now, you, Mr. Smith— [1284]

The Clerk: Plaintiff's Exhibit 51 in evidence. [1285]

* * *

(Testimony of S. R. Smith.)

Q. I am asking you to assume a $40 a ton differential and ask you whether Rosenberg Bros. could possibly have come out—withdraw the possibly—could have come out even on those contracts by purchases made from September 23 to the end of December, 1947?

A. Assuming $40 a ton, making a mental calculation, the average of these prices for the three periods which I made reference to, no; the average plus $40 would exceed the contract price. [1287]

* * *

Q. I think you testified to it today, Mr. Smith, according to my notes, because I was going to ask you a question on it. You were asked what your opinion was and why there was a decline in prices from September to October, and you answered it was caused by the lack of buying of the packers, wasn't it?

A. I said in my opinion I thought an important factor was the lack of active buying on the part of packers.

Q. Now, do you share the views of Senator Anderson that there was in that period practically a grower revolt and the growers were not offering their crops for sale? Could that have been an influencing factor, too?

A. The position that growers took with respect to selling their raisins was undoubtedly a factor in the price behavior of the field price behavior on raisins. [1288]

* * *

(Testimony of S. R. Smith.)

The Court: Before you launch into an answer I would like your concept of a short position, Mr. Smith, as distinguished properly from a short position in the stock market as such. That is, particularly in the light of certain statements Senator Anderson made yesterday as to short in the market. Is the concept that you have with respect to short position comparable to what may be regarded as short in the market in a broker's transaction?

The Witness: Well, the simple concept, as I understand it, is making sales of something you have in hand at the present time.

The Court: But to what extent does your concept, as applicable to the case at bar, have with regard to a depressant in the market as distinguished from perhaps the non-availability of the particular commodity at the time the price is offered or indicated?

The Witness: If an operator sells short and then doesn't undertake to acquire to cover his commitments his buying power as a price making factor consequently isn't present in the market, and in that way I would say contributes a price depressant influence.

The Court: And that applies whether the transaction be listed or unlisted, I assume. As I understand it, these matters were not the subject of listing in any particular board or any particular market as such. They were merely undertakings [1290] by certain individuals to sell certain commodities at a time when they did not have the commodity.

(Testimony of S. R. Smith.)

The Witness: That is right, and in this instance, sir, it is a matter of whether—it comes down, as I have always understood it, as to whether they had the title to the product at a fixed price or not there being two, we will say, general ways in which a product like raisins is purchased by packers from growers; one a firm price basis, and one an open price basis.

The Court: How was it possible for these people to acquire the product when the raisins were not even on the drying board at the time these prices were indicated?

A. Well, in terms of physical acquisition, Your Honor, that of course would be impossible; but in terms of entering into a contract such as packers do, it has been my understanding for years that the growers are willing to enter into a contract of delivery of a certain amount which is subject to adjustment upon actual delivery when the raisins are in process, or even earlier.

The Court: Well, is it not true in the case at bar in our specific problem that the growers were quite unwilling, and in fact adamant with respect to entering into any undertakings in the light of the conditions confronting the growers as well as the processors?

The Witness: Well, generally speaking, Your Honor, the [1294] facts are as I know them and as they are before the Court; if there had not been any transactions, actual purchase and sale of raisins, there would have been no quotations reported by

(Testimony of S. R. Smith.)

the Market News Service, but as I stated to you before, Your Honor, how much in terms of quantity actually exchanged hands at those prices I am not in a position to inform you.

There was no organized method at that time to determine the quantity that was exchanging hands between growers and processors, and as I stated previously, grower agitation to not sell at the low prices prevailing during the period that we have been discussing undoubtedly had a bearing on the ability of packers to acquire. But as far as I am concerned, at the time that I was considering that claim I didn't have that information.

Having had access, subsequently, to records which reflected the operation of Rosenberg Bros. & Co. during that season I would say that we get a pretty good picture of one—clear picture of what that one firm did during the whole season and during the immediate period that we have been talking about.

Q. (By Mr. Dinkelspiel): Well, what you are saying in answer to His Honor's questions on this matter of damages is that because the market dropped in January and stayed down for a period of January and February, Rosenberg Bros. wasn't damaged in its government contracts. That is your whole theory, isn't it, Mr. Smith? [1292]

A. I stated that by virtue of having represented to us that they didn't have the raisins with which to meet the delivery orders which were submitted to them that at the time we had that fact to consider, and presumably the raisins which were set forth as

(Testimony of S. R. Smith.)

having been acquired during the period September through December must have been used to fill civilian trade. [1293]

* * *

Q. Mr. Smith, let's get back to a moment following the lines of His Honor's question. You had a meeting in San Francisco, you testified, on August 2nd with the producers. I have shown your counsel a newspaper clipping entitled "Early federal aid is sought for raisin men", San Francisco date line August 2, and I was just going to ask you a couple of questions as to whether there is a correct reflection of what took place, in part, at least.

"S. R. Smith of Washington, D. C., Director of the Fruit and Vegetable Branch of the United States Department of Agriculture who met with the industry leaders in the Palace Hotel, asserted he is aware of the serious outlook for the entire grape industry."

I assume that is something you stated, is that right? A. Yes.

Q. "'And I also am aware of the imminence of the harvest season for the raisin producers', he added, 'action will have to be taken soon if [1295] the government is to be in time.'"

Is your recollection all right on that?

"Smith declared he was unable to make any definite commitment on the government program recommended by the raisin producers. He said he will submit the suggestions to His superiors in the Department of Agriculture in Washington."

(Testimony of S. R. Smith.)

Is that a fair statement?

A. I have no quarrel with it. It is a newspaper report.

Q. What was that program of the raisin producers?

A. The proposal on the part of the raisin producers involved what I have been describing as a price support program under which the Department would name a specific price and undertake to support the market at that price level.

Q. And wasn't the price that the raisin producers were then asking $160.82 a dried ton?

A. Sir, their proposals I think initially started out that such a support price should be at full parity, and the price that you named there I think at that time was full parity.

Subsequently they talked about $150, but in the neighborhood of those prices is what was a part of the raisin growers proposal.

Q. Isn't that position of the Raisin Growers Association, wasn't that in part, substantial part, responsible for the thinness of the market in September and October, or September [1296] and the early part of October?

A. I think a fair and honest answer is that the activity of producers during that period of time had a substantial bearing upon the market behavior and prices on raisins.

Q. I see that Mr. William N. Keeler of the Sunmaid Raisin Growers Association was present. Do you recall his being present? The paper says it.

(Testimony of S. R. Smith.)

A. I think Bill Keeler was there, yes.

Q. As a matter of fact, the Sunmaid Raisin Growers Association was present at this meeting of growers because it is both a grower and a packer, isn't that correct?

A. That is correct.

Q. In other words, when it submitted the bids in response to the Senator's program, they bid at a certain price and was able to meet that bid through its own crops; those crops were owned by its associates, isn't that correct?

A. Well, a co-operative surely is in a different position than that of an independent handler having the crops of its membership under contract; it knows where its tonnage that it is going to use for trading purposes is going to come from and what the final actual tonnage will be. Of course, they don't know at the opening of the season, but that comes to them in the way of deliveries as the raisins come off the trays. [1297]

* * *

Cross-Examination
(Continued)

By Mr. Dinkelspiel:

Q. Mr. Smith, exactly what was your part in preparing the program announced on September 5, 1947?

The Court: What was that question, pardon me?

Q. (By Mr. Dinkelspiel): What was your part in

(Testimony of S. R. Smith.)

the preparation of the program announced on September 5, 1947?

A. One of the responsibilities and duties of the Fruit and Vegetable Branch of which I am Director is to formulate and prepare program proposals for submission to the Commodity Credit Board for its consideration and disposition, and in connection with program proposals on the 1947 crop of raisins, the proposals were incorporated in a docket prepared in my Branch under my general supervision and direction and presented by me to the Commodity Credit Corporation. [1299]

Q. You personally are an expert in the field of dried fruit and the problems confronting the dried fruit industry as reflected in 1947, isn't that correct?

A. I think I would say that I gained a fair amount of knowledge concerning the dried fruit industry of California, yes.

Q. I am showing you a docket, which is Plaintiff's Exhibit No. 5, and note that under date of August 25, 1947, the recommendation, which is the first full page in the docket, is signed by you. I will give you a photostat, that will be sufficient, will it not?

A. What is your question?

Q. That was signed by you?

A. Yes, yes. That's right.

Q. In other words, the recommendation goes forward with the approval of your branch of which you were the Director?

(Testimony of S. R. Smith.)

Q. Just one point here on that, I notice in the third paragraph it says: "Purchases will be authorized from the date on which the Secretary signs this docket through June 30, 1948." Was that to cover the entire crop year?

A. Yes, that's a common method of covering the period during which the officials authorized to administer the program have authority in which to operate.

Q. This program recommended by on behalf of your Branch was [1300] a program to take care of the situation in raisins for the crop year ending June 30, 1948?

A. The overall presentation that I made to the Commodity Credit Board on, as I remember it, August 27, 1947, was directed toward taking care of what surplus might develop from the 1947 crop.

Q. At that time, at the time of the recommendation for the docket, or in the docket, which is dated August 25, 1947, did you have before you information or knowledge as to the Industry's estimate of a surplus or balance of raisins to be expected on hand?

A. Mr. Dinkelspiel, I can't recall that I had before me at the time of the preparation, the docket was being prepared, or when I submitted the proposal to the Board. However, as I have previously testified I held a series of meetings out here in California during the forepart of August, and there had been considerable discussion among the Industry groups on the various dried fruit items, and I was aware of what the Industry was indicating the surplus in the case of raisins might be.

(Testimony of S. R. Smith.)

Q. And what was that amount?

A. If I remember correctly, the estimate of one tabulation or analysis indicated the possibility of 100,000 tons.

Q. Did you or your branch agree in substance with that estimate? [1301]

A. After we had conducted our own independent analysis, which we feel obligated to do, and do as a matter of course, it so happens as the record will show that the estimate that the Branch made in connection with the presentation of the docket to the Board was that we anticipated a surplus of 98,000 tons packed processed weights.

Q. And that is shown on the page numbered two in this docket which was prepared by you as the estimated raisin surplus of 98,000 tons?

A. That is correct.

Q. And to take care of the surplus, estimated surplus of 98,000 tons this program contained in docket—Plaintiff's Exhibit 5, was recommended by the Fruit and Vegetable Branch?

A. That docket, sir, was not the only proposal, that the Fruit and Vegetable Branch made to the Commodity Credit Board. In conjunction with the presentation of that docket the Fruit and Vegetable Branch also submitted to the Commodity Credit Board a proposal with respect to an export payment program.

Q. That was the one that was rejected?

A. At that particular meeting, sir, the Board did not take action, but, as I remember it, after a con-

(Testimony of S. R. Smith.)

siderable discussion the motion was made to place it on the table for further consideration.

Q. And was it ever adopted? [1302]

A. It was not.

Q. Okay, that disposes of it, then.

Now, Mr. Smith, did I understand you to correctly that there were two proposals made by the Fruit and Vegetable Branch for the 1947-1948 raisin season, and only one of them was accepted? I am talking now about this initial stage of this original docket of August 25, 1947.

A. Counsel, my presentation to the Commodity Credit Board on August 27 was of an overall proposed program of which the purchase part was incorporated in the docket that we have just been talking about.

Q. So that we don't have to read it word for word and take up His Honor's time——

The Court: You said 1927, did you? You meant 1947?

The Witness: 1947, thank you, sir.

Q. (By Mr. Dinkelspiel): So we don't have to take up the time by reading this in detail, unless you want to, Mr. Witness, unless you have forgotten, which I don't think you have, the program called for the purchase of not in excess of 133,000 tons of dried fruit of which 61,000 tons were to be raisins.

Now, isn't that correct? Plus your recommendation with respect to the foreign purchases?

A. Sir, if I remember that docket——

(Testimony of S. R. Smith.)

Q. I would like you to look at it if you don't remember it, [1303] because I question whether you don't remember.

A. I think I do remember, but it doesn't square exactly with the way you made your statement.

Q. Well, correct me, if I am wrong, we have been assuming that those were the facts from the start of the case.

A. No, I am not trying to quibble with you, sir, but the docket proposed a maximum purchase of 133,000 tons. It is my recollection that docket itself says nothing about 61,000 tons on raisins.

Q. Well, what was the docket recommendation on raisins?

A. Under maximum quantity on Page 4, the docket reads:

"The maximum quantity covered by this docket is 133,000 tons. Included in this quantity is a contingency purchase of 55,000 tons, comprising 30,000 tons of dried prunes and 25,000 tons of raisins."

Q. What is meant by the contingency purchase as you used that phrase in 1947?

A. In order to explain, that, Your Honor, I have to, it seems to me, explain the overall program proposal which I submitted to the Board, because this portion of the docket is an integral part of it, and I will make it just as brief as I can.

As I have stated, the proposals in the form of dockets constituting what we considered an overall program for dried [1304] fruits for the 1947 season started, included the plan of subsidizing the

(Testimony of S. R. Smith.)

commercial exportation of dried fruits, and we will confine in this instance to raisins.

The reason for that being, as I previously testified, that foreign countries constituted an important market for raisins prior to World War II, and in the interest of helping to regain those markets, we were proposing to facilitate the shipment and exportation to an export payment program. And the maximum quantity provided for the plan submitted by the Branch was 80,000 tons of raisins.

Then as an accompanying or companion action, recognizing that payments were, commercial exportation might not facilitate prompt and immediate movement of sufficient quantity raisins to contribute effectively to stabilizing the grower market price, as well as the commercial market, the branch proposed that it be supplemented by the purchase of raisins.

Now, in discussing the plan with the Board, I broke down the 133,000 tons contained in the docket and the portion which I indicated that we had in mind as a supplementary operation to subsidizing commercial exportation by purchasing was 61,000 tons. But of that 61,000 tons, depending upon the effectiveness of the export payment program, we were proposing to hold in reserve 25,000 tons of raisins, the difference between 61,000 and 25,000 tons, or 36,000 tons, [1305] were provided in the docket to authorize purchases when and if the Fruit and Vegetable Branch saw necessary.

Now, it is obvious that the 61,000 tons that I

(Testimony of S. R. Smith.)

proposed as being the part that should constitute raisin purchases of the 133,000 tons in the docket, plus the 80,000 tons proposed as a maximum on which payments, export subsidy payments were to be made, constituted 141,000 tons.

Now, we didn't, at that juncture, visualize that the surplus would necessarily be 141,000 tons indicated——

Q. (By Mr. Dinkelspiel): That is all dried fruits?

A. No, that has reference, sir, to raisins.

Q. All right.

A. (Continuing): ——but just a note of explanation, not knowing, as I stated before just how effective the export payment program might be in moving supplies out of the country, we incorporated some leeway.

Q. Mr. Smith, would you mind pointing to the part of the docket that calls for purchases of anything in excess of 133,000 tons? I would like to direct your attention to Page 2——

A. If I have indicated——

Q. You certainly have indicated there were additional purchases beyond the 133,000 tons contemplated and I ask you whether that is true or false.

Mr. Fruit: I object to that, Your Honor. The witness [1306] has been testifying with respect to this docket and the related export payment docket which I submit——

Mr. Dinkelspiel: I asked him to testify with re-

(Testimony of S. R. Smith.)

spect to this document, if Your Honor please, and point out to me anywhere where in this docket there is a contemplated purchase in excess of 133,000 tons.

Q. (By Mr. Dinkelspiel): My original question, Mr. Smith, when you started to make this long explanation, which you are entitled to make, was: What was this contingency 35,000 or 25,000 tons, what did that mean, and then you started to get off on this export business.

Now, I will withdraw that question and ask you specifically to point out to His Honor where in this docket anywhere's there is any provision for purchase in excess of 133,000 tons over-all?

Mr. Fruit: I am not clear what is happening here. Counsel said he is withdrawing the question, that is, the initial question.

Mr. Dinkelspiel: If the initial question has been answered, it may stand as far as it goes. I think it is completely irrelevant and non-responsive, but I am not going to take the time of the Court to argue —wait a second, please. I am now asking this question, which was inherent in the first question

Q. (By Mr. Dinkelspiel): Will you please confine your [1307] answers to the docket for a moment and find out and point out to His Honor where, if anywhere, there is a provision in this docket recommending more than 133,000 tons?

A. It is not any place.

Q. As a matter of fact——

A. ——any statement in the docket which provides for the purchase of more than 133,000 tons

(Testimony of S. R. Smith.)

of dried fruits. And in explaining and attempting to explain the 25,000 tons contingency purchase, as I stated, it was necessary for me to give this other explanation that I did, and I was just at the point of tying the 25,000 ton contingency purchase in with the rest of what I had just said.

In other words, my statement as it stands is not a complete answer to your original question.

Q. Well, Mr. Smith, this contingency fund, this contingency amount, is it or is it not included within the 133,000 tons?

A. It is included in the 133,000 tons.

Q. And so stated, is it not, at the bottom of Page 2 of the docket? A. That's right.

Q. Will you read it to His Honor? Will you read it, please?

A. Oh, at the bottom of Page 2?

Q. Yes.

A. (Reading) [1308]

"The purchase of approximately 78,000 tons of dried apples, dried peaches, dried prunes and raisins is expected to have a stabilizing effect on the market prices for these fruits if commercial exports exceed 100,000 tons. An additional contingency purchase of 55,000 tons of dried prunes and raisins by the Commodity Credit Corporation (making a total purchase of 133,000 tons) is proposed to provide against the eventuality that such exports will be restricted to the point of causing burdensome carryover stocks and thus defeating the purpose of the program."

Q. Now, will you turn to Page 4 of the docket

(Testimony of S. R. Smith.)

under the words "maximum quantities" and read to His Honor what you then said?

A. (Reading)

"The maximum quantity covered by this docket is 133,000 tons. Included in this quantity is a contingency purchase of 55,000 tons comprising 30,000 tons of dried prunes and 25,000 tons of raisins. Likewise, the 18,000 tons to be purchased under Section 32 is included."

Q. Did you fix the 61,000-ton purchase figure for raisins?

A. As I recall, having stated just a little while ago in my presentation of this and the export payment docket to the [1309] Board, as is my custom when dockets provide maximums, either in terms of money or quantity, I relate to the Board what the intention or plan of the Branch is.

Q. Did you or did you not recommend the 61,000 ton limit on raisins? Yes, or no, and then explain, please, Mr. Smith.

A. As a part of my recommendation.

Q. You did——

A. Recommend 61,000 tons.

Q. You were asked by Mr. Fruit yesterday, I am quoting from Page 1247 of the transcript with reference to this tonnage, Mr. Fruit says:

"Question: Do you know why that was done?

"Question: Mr. Smith, if I remember correctly, the Judge stated in the course of your examination, among other things, that he was interested in knowing why the Commodity Credit Corporation fixed

(Testimony of S. R. Smith.)

initially upon the 61,000 ton purchase figure. Do you know why that was done?

"Answer: If I am to testify to what I knew at the time, I can't give a full and specific answer."

Is that correct? A. I so testified.

Q. Now, Mr. Smith, if you will proceed with this docket for a moment and turn to Page 3, top of Page 3 you say:

"It is estimated that, in the absence of any [1310] Government price support program for raisins, raisins made from the 1947 grape crop may average somewhere below $100 per ton."

Was that your understanding at the time?

A. That was our best judgment at the time, yes.

Q. The next paragraph:

"Prices to growers are not yet established for 1947 crop dried prunes."

——well, I will withdraw that, this has to do with prunes, Your Honor.

Q. (By Mr. Dinkelspiel): Now, Mr. Smith, also on Page 6,

"Period of purchase

"Purchases under this program shall be made during the period beginning with the date on which the Secretary signs this docket and ending with June 30, 1948."

Those your words?

A. Yes. When you say, "are they my words", it is what I presented to the Board, sir.

Q. This was the program meant; was it not, for the entire 1947-1948 crop year?

(Testimony of S. R. Smith.)

A. This docket was intended to apply to the 1947 crop season.

Q. "Insofar as is practicable, purchases shall be made when growers are selling natural condition fruit [1311] to packers and processors."

Is that your statement? A. Yes, it is.

Q. Will you state to His Honor whether or not in September, 1947, specifically when the first announcement went out, September 10, 1947, whether to your knowledge growers at that time were selling to packers and processors?

The Court: At what time?

Mr. Dinkelspiel: September 10, 1947. [1312]

A. We had no specific knowledge of the magnitude of dealings between growers and packers at that time, recognizing that the season was just opening and there were discussions in the field regarding perspective prices to be paid producers for raisins.

Q. Now, Mr. Smith, don't you know, after all you have qualified yourself as an expert and I think properly in this field, that purchases made at that time of year are largely for bakery consumption?

A. I don't think I could testify, sir, that they are made only for bakery——

Q. I didn't say "only." "Largely for" is what I said.

A. I can't honestly testify as to that.

Q. Were you keeping in touch with the situation in Fresno and the rest of the Valley in September, 1947, with respect particularly to the attitude of growers towards selling?

(Testimony of S. R. Smith.)

A. I thought at the time that we were reasonably well informed of what was going on, sir.

Q. Do you know what the growers were demanding at that time through their growers' organization?

A. I have some fairly good recollections, I think, of what growers were saying they should get for their raisins.

Q. What were they saying they should get in accordance with your recollection?

A. As I recall it, they were not much different than what [1313] they had represented to me when I had been out here in California.

Q. That was parity?

A. In the early part or the forepart of August, talking about prices, either 90 or 100 per cent of parity, which in terms of dollars per ton, was 150 dollars or more.

Q. Of natural raisins?

A. For natural Thompson Seedless.

Q. Was it your idea or the idea of your Fruit and Vegetable Branch that the way to improve this situation was to call for competitive bids from packers?

A. The proposal submitted by myself to the Board proposed that approach.

Q. And, Mr. Smith, when you called for bids on September 10, you called for bids for less than the total estimated surplus, that is correct, is it not?

A. That is correct.

Q. As part of a program calling for less than the total surplus. If you want any recollection re-

(Testimony of S. R. Smith.)

freshed on that I will show you the Secretary's announcement which is Plaintiff's Exhibit 4 if you don't remember that from your own knowledge.

A. I remember it, sir, or at least I remember what the press release stated. May I have the question read?

(Question read by the Reporter) [1314]

Q. (By Mr. Dinkelspiel): Yes, or no, and then explain.

A. Yes, and I would like to explain. At the time the press release was issued, and at the time the invitation to submit offers was submitted to the Industry under date of September 10th, I personally did not know the intentions of the Commodity Credit Board and the Secretary of Agriculture with respect to how much over and above what the docket I have submitted there would undertake to purchase.

Q. Mr. Smith, you recommended, as I understand your testimony this morning, a 61,000 purchase program out of an anticipated deficit of 98 or 100 thousand—anticipated surplus?

A. I so testified, and I also testified that in conjunction with that proposal I made another recommendation so that the Board still had under consideration the matter of how we would meet the overall surplus problem.

Q. Well, when the Secretary announced to the Industry the contemplated purchase of 61,000 tons

(Testimony of S. R. Smith.)

maximum, I will ask you whether, to your knowledge, any statement was made, publicly or any information transmitted to the Industry or to the growers that another program for farm purchases was contemplated, if you know?

A. When the September 5 press release was made it did not contain such a statement.

Q. Was any other statement issued, to your knowledge, by the [1315] Secretary of Agriculture, by the Fruit and Vegetable Branch, by the CCC or any division, subdivision part or parcel thereof prior to October 14, 1947, that any further purchases for foreign aid or anything else were to be made?

A. What was the closing date of your period, sir?

Q. October 14, 1947.

A. Prior to October 14, 1947, I can recall only one conversation in which I participated with someone outside the Department as to what, over and above 61,000 tons, the Department or Commodity Credit Corporation might do.

Q. I am asking you whether any announcements were made or any notification to the public given that there was any other program contemplated?

A. Public announcement, no, to my best knowledge and recollection.

Q. Was there any announcement made to anybody—withdraw that.

Was there any announcement made to the Industry or growers or packers that this foreign program had been recommended?

(Testimony of S. R. Smith.)

A. No, the only time the Industry was advised of that subject came up was during the discussions which I held when I was out here, and I think Secretary Anderson made reference to them in his speech in Fresno on August 4, 1947.

Q. The fact of the matter is, that program was never put [1316] into effect, that foreign purchase program?

A. The proposal submitted by myself was not.

Q. When was it finally put to rest or disposed of, if you know?

A. When the final decision not to act upon that docket was made, I do not know.

Mr. Dinkelspiel: Could we have that date, Counsel, supplied to us?

Mr. Fruit: I am not sure that there was a ——

The Witness: In the way of explanation, sir, I can add this: That sometime later the docket proposal was returned to the Branch, but just what that date was, I don't recall.

Mr. Dinkelspiel: Well, possibly between now and the next week we can find out the approximate date.

Mr. Fruit: You asked counsel a few minutes ago. We will give you the date on that.

Q. (By Mr. Dinkelspiel): Now I want to ask you this, Mr. Smith. I know it is a little difficult for you, you are a Government employee doing a very good job and you may have a little difficulty disagreeing with your superiors in program or other things, and I am not going to try to embarrass you,

(Testimony of S. R. Smith.)

but I am going to ask you this question and I would like to have an answer if you feel free to make it. If you had known the foreign purchase program was not going to be put into effect, would you have recommended the purchase of [1317] a maximum of 61,000 tons of raisins by competitive bidding from the packers?

A. Well, that question has at least two parts.

Q. Well, make it in three. Make it in as many as you want.

A. It must be answered separately. Had the Fruit and Vegetable Branch and myself known that the export program would not be adopted, I am quite certain in my own mind that the proposal with respect to purchases under Commodity Credit authority would have been different from what it was.

As to that part of your question which relates to whether we would have proposed that even a larger quantity, had it been recommended and had the Board adopted it, would have provided a method that we proceed on an offer acceptance basis, I must truthfully say that I still would have so proposed and my reason is this—and I might note at this juncture that some reference to it is made in the docket itself.

I have testified heretofore that I had a whole series of meetings out here with the different groups. We received many communications back in Washington, and I personally was very conscious of the temperament and attitude of growers as well

(Testimony of S. R. Smith.)

as packers. At least, I gained some rather definite reactions and impressions, and I can't log the situation in my own mind as being a year of not only adjustment in terms of industry operations, but mental adjustment on the part of both growers and handlers to conditions confronting the Industry which would [1318] be quite different from there on out than they had been in the immediately preceding years.

As a part of a device to affect some appreciation on the part of the Industry to their own problems, I stated to the Board that I thought that the Industry should assume some responsibility in arriving at the price for the 1947 crop. Now, the docket in that respect is broad. The language didn't confine the actual operations to any particular method, but again saying in answer to your question, I have to testify that I proposed that method of operation.

Q. Well, you proposed it, Mr. Smith, in conjunction with a proposal at the same time for a foreign purchase program, isn't that correct?

A. That is correct.

Q. If you had known that the foreign purchase program was not going to be adopted by the Commodity Credit Corporation, would you have recommended the purchase of more or less than 61,000 tons of raisins?

A. I undoubtedly would have proposed the purchase of a larger quantity, which I did do subsequently.

Q. So we know, Mr. Smith, isn't it a fact that

(Testimony of S. R. Smith.)

asking for bids—I will withdraw the question.

Isn't it a fact that the announcement of a program calling for a maximum substantially less than the surplus prophesied necessarily would be a deterent on market prices? [1319].

A. Drawing on my——

Q. Will you answer that yes or no, please, then an explanation?

A. I have to answer you, not necessarily.

Q. That is a qualified yes or a qualified no, which is that?

A. Yes and no. In the field of economics I think you have to give a lot of yes and no answers.

Q. How about in the field of trying to keep prices of growers at a proper level? I am talking now about the effect upon the market of a program calling for the purchase of only a part of surplus, and with no announcement made as to disposition that is to be done with the balance of the surplus?

A. In answering your question, I hope you don't construe that I am trying to quibble or argue with you.

Q. Well, wait until I get the answer.

A. These are honest convictions on my part. Granted the 61,000 tons originally announced was not equal to what actually prove to be the surplus. Yes, based on experience that I have had in the operation of Government programs I can truthfully say that the timing of our operations, apart from the total quantity you actually buy, has a very

(Testimony of S. R. Smith.)

important bearing on price behavior at the lower level.

Now, why did we go out with an invitation to buy only [1320] 30,000 tons in our September 10th announcement? Why did we go out September 10th?

There has been some indication here before the Court that would indicate that well, we should have known better; that most of the raisins were still on the trays and in the hands of growers. I felt in inviting offers on 30,000 tons was this. That offering to buy such a large quantity that early in the season it would have a material stabilizing effect, and we didn't necessarily assume or believe that we would necessarily get that full quantity offered to us, but showing that the Department was moving into the season's operations in an aggressive and positive manner.

Q. Well, I'm afraid, Mr. Smith, I will have to get back to my question as to whether or not the announcement of the program for purchasing a maximum which was substantially less than the then estimated surplus, would or would not have a deterent effect upon the market, and by "deterent effect" I mean would have the effect of keeping or driving prices down rather than forcing them upwards. I am talking, Mr. Smith, and I think you know, about a 61,000 maximum announcement, not necessarily about the first 30,000 tons bid for because there was another 31,000 tons coming along. I am asking you whether, is it a fact, in your knowledge in the Industry, your knowledge as an economist, that announcement of a program for sub-

(Testimony of S. R. Smith.)

stantially less than the surplus of the commodity has [1321] the opposite result from forcing the market upwards?

A. I have heard those arguments, and I can honestly say that I can't agree with them in toto.

Q. That is all right, sir, we will accept your statement that you don't agree with them.

Now let me ask you the same question. If you add to the purchase of substantially less than the anticipated surplus the requirements that the bidding be competitive, whether those two factors would not then have a deterent effect upon the market?

A. If I confined my knowledge wholly to your statement which, however, I don't think right under the circumstances and explain——

Q. Well, answer my question first.

A. All right, I would answer question that buying less than a known surplus would contribute to establishing a price at a lower level than if you bought the whole surplus.

That, I think is just a matter of the working of supply and demand, the economics of the working of supply and demand.

Q. Mr. Smith, did you join Senator Anderson at Albuquerque? A. I did not.

Q. You had accommodations to go there, didn't you, at one time? A. I did not.

Q. You were not there when the announcement was made, were [1322] you? A. I was not.

Q. Had you worked in preparation of the announcement of the 61,000 ton maximum program?

A. I presented the program to the Board, yes.

(Testimony of S. R. Smith.)

Q. No, I mean had you participated in the preparation of the Secretary of Agriculture's announcement, Plaintiff's Exhibit No. 4?

A. To the best of my recollection we did draft a proposed press release in Fruit and Vegetable Branch.

Q. I am not asking whether "we did." This time I am asking whether you did?

A. Whether I had any direct hand in it, it would constitute as one thing my approving of a proposed draft.

Q. Well, I am not asking for theories, sir, or what you may have done.

A. I apparently can't get conveyed to you how Government operates, and that is why my answers apparently don't satisfy you on occasion.

In other words, putting it very simply, as far as the Fruit and Vegetable Branch is concerned, I, one S. R. Smith, don't do everything that that Branch does, or write every document that I submit, or sign my name to or prepare every press release that is issued and carries my initials on it.

Q. Now Mr. Smith, all I am asking you [1323] here——

A. Now, in this instance I am trying to answer you truthfully as to how it happened. I stated that to the best of my recollections a proposed press release was drafted from the Fruit and Vegetable Branch, it was sent forward, as we say, meaning submitted, to my superiors and in so submitting it, it had my approval.

(Testimony of S. R. Smith.)

Q. More than that you can't tell us, whether you actually participated in its preparation or not?

A. Well, I consider——

Q. Yes, or no, and then give us your explanation, please. A. Yes, yes.

Q. I am sorry, but you are testifying, you are not speaking. A. Yes, I participated.

Q. You remember that now, or are you assuming that, Mr. Smith?

A. No, I am not assuming it. Let me explain what my answer means, or what I have in mind. My participation consisted of viewing and approving a proposal that was prepared in my branch and submitted to me for submission to my [1324] superiors.

* * *

Q. Now, let's take off the dark glasses, Mr. Smith, for the moment.

The fact of the matter was that the Commodity Credit Corporation Board had not accepted the Fruit and Vegetable Branch's recommendation with reference to the foreign purchase program, and you and your associates therefore presented to [1326] the Commodity Credit Corporation a substitute program for getting rid of this surplus, and that was represented by the announcement of October 14, the announcement that an additional 60,000 tons would be purchased. Now, isn't that all there is to it?

A. No, sir, that is not square with my recollec-

(Testimony of S. R. Smith.)

tion and understanding of what happened, sir. To my knowledge and belief——

Q. Well, let's have of your knowledge first, because that is what we are most interested in.

A. I personally never recommended the increase of total quantity by 60,000 tons. I made a recommendation, however, that the quantity be increased above 61,000 tons.

Q. But as I understand it, this additional 60,000 purchase was not your recommendation?

A. The additional 60,000 tons was not my recommendation, that is correct.

Q. Mr. Smith, when you recommended the calling for competitive bids from packers so early in the crop year, early September, because I believe your docket was dated August 25, and recommends putting the program into effect without delay, I will ask you whether you expected the packers to be in possession of the raisins, so raisins to the extent of 30,000 tons then called for on bids?

A. As I have previously stated, as I remember it, we did not [1327] know the extent to which packers had in hand or under contract 1947 crop raisins. As I have also previously testified, our reason for announcing or inviting offers on 30,000 tons was not necessarily with the expectation that we would have offered that quantity, or that we would actually find or actually buy the full 30,000 tons. The final conclusion at the time the announcement was issued would be predicated on the nature of the offers which packers actually submitted to us. [1328]

* * *

(Testimony of S. R. Smith.)

Q. (By Mr. Dinkelspiel): I think, Mr. Smith, you were asked just before the recess if you would tell us when, if ever, you first learned that the packers were short of raisins when they bid pursuant to request for bid following th Secretary's announcement?

A. I had a letter from Dwight Grady under date, I think, September 12. Among the things that Mr. Grady reported was that the independent packers didn't have, or had acquired, I don't recall his exact language, very many, if any, raisins of the 1947 production, or perhaps actually used the expression, "in short position."

Now, as to the position whether long or short——

Q. Now, before you make another speech, Mr. Smith, I would ask you this one time to respond first to my question: When, if ever, did you first know that the packers were short when they bid for these government contracts?

A. Knowing as a matter of fact?

Q. Yes, sir. I can help you out if you want me to. A. No.

Q. You have a few statements on it in the record, I mean. A. We had——

Mr. Dinkelspiel: I ask the witness please answer the question, Your Honor. Your Honor, at this time I would like [1331] to insist upon it. It is a simple question. If he didn't ever know it, let him so state it; if he did know it, then I ask him when.

A. Well, I recall that in reporting to the Commodity Credit Board——

(Testimony of S. R. Smith.)

Mr. Dinkelspiel: I will ask that the witness answer the question, Your Honor.

Mr. Fruit: How do you know he is not going to answer it?

The Court: I take it that you are about to answer it, aren't you?

The Witness: Yes, to the best of my ability, Your Honor.

Mr. Dinkelspiel: Well, it calls for a date, Your Honor, not an explanation first. I have asked for a date.

A. Well, I can't recall a specific date, sir. If I could, I would give you a specific date.

Q. All right, you can't recall a date. Let me now show you your memorandum of October 23, your report to the Administrator, which is in evidence as plaintiff's Exhibit No. 50, and I will read to you, show it to you, your second, third sentence in the first paragraph:

"The processors who sold to CCC were and are for the most part in short position. Until recently they had been attempting to obtain supplies to fulfill their contractual obligations and found it difficult to do so because of the producers' [1332] resistance to the $110 to $120 per ton price offered."

Now, Mr. Smith, I will ask you whether on the date which this letter bears, this report bears, October 23, you knew that the processors who sold to CCC were and are for the most part in short position?

(Testimony of S. R. Smith.)

The Court: What was the date, counsel?

Mr. Dinkelspiel: October 23, 1947.

A. Based upon the information and reports——

Q. (By Mr. Dinkelspiel): Yes or no, please, to that question. That's a simple question, Mr. Smith; let's have a simple answer for once.

A. Well, in my——

Mr. Fruit: Your Honor——

A. (Continuing): ——judgment, sir, I can't honestly answer that question, yes or no.

Mr. Dinkelspiel: If Your Honor please, I would like the question reread to the witness and I ask Your Honor's ruling whether it is capable of a yes or no answer.

The Court: Well, I think this is in the nature of an impeaching question, is it not?

Mr. Dinkelspiel: Your Honor, what I am really trying to find out with the witness is when the witness first knew this and he fails to give me the answer, and I am going to prove it out of his own mouth.

The Court: I think you can establish it, Mr. Smith. I [1333] think it is within the realm of a positive date, or at or about a positive date. If you have an explanatory note, you may make it.

The Witness: On or about October, 23, I had information that packers were or had—well, using the—"The processors who sold to CCC were—" and at that time said "are for the most part in short position."

By way of explanation, Your Honor, to my ap-

(Testimony of S. R. Smith.)

parent inability to answer counsel's previous question, I was fully aware that I had made such a representation to the Commodity Credit Board. But in fairness to him I was trying to recall in my own mind how much before this particular date I was aware, and that was what I was trying to get at. I think counsel misunderstood what I was trying——

Q. (By Mr. Dinkelspiel): Let's facilitate your research on that subject, Mr. Smith. It is courteous of you to think of me and likewise I am thinking of you. I am giving you Plaintiff's Exhibits 6, 7 and 8, and I will ask you to bear with me while I ask you one or two questions with respect to them.

Plaintiff's Exhibit No. 6 is, as you have already testified, a telegram to you from Dwight K. Grady, dated September 9, 1947, is it not? A. Yes.

Q. Which, in general, protests against this program which had been announced on the 5th of September, is that right? [1334]

A. That's correct.

Q. Will you turn to the middle of the page with the words "commercial handlers have been unable to contract new crop tonnage to date which approximates two-thirds total crop. The same thing prevails among raisin handlers and believe satisfactory basis could be stabilized which would permit immediate resumption of trading these commodities."

Did that statement indicate to you that at least Rosenberg had been unable to contract new crop tonnage?

(Testimony of S. R. Smith.)

A. I took it as a statement by the party who sent me the wire.

Q. Did you have a reason to question the truth of it?

A. At that particular time I had no particular reason for questioning it one way or the other.

Q. Have you any particular reason to question the truth of it now?

A. I have more reason now, sir, for not questioning the statement with respect to Rosenberg Bros. & Co., than I did then.

Q. You mean, you are pretty sure now they were short? A. That's correct.

Q. All right, sir. Let's turn to Plaintiff's Exhibit No. 7 and see if they were a little more persuasive in that. Have you got No. 7 before you?

A. Yes, sir. [1335]

The Court: May I see the exhibit you just examined as we go forward so I may correlate the matter?

Mr. Dinkelspiel: The wording appears in the middle of the page, Your Honor.

The Court: Go right ahead.

Mr. Dinkelspiel: Starting with "commercial."

Q. I refer you to the second paragraph, Mr. Smith, reading as follows—by the way, who got this letter? Isn't it addressed to you, "Dear Sy"?

A. I did, sir.

Q. The second paragraph:

"Now, I don't want you to think I am hollering before I am hurt, but there is one peculiar situation

(Testimony of S. R. Smith.)

in both prunes and raisins. As I told you in my wire, about two-thirds of these two crops, probably closer to 70 per cent, are handled by commercial processors and the balance is in the hands of the co-ops. Therefore, unless there is a radical change in the situation in the next few days, packers' offerings in response to invitation to bid will be substantially short sales, at least insofar as new crop is concerned except that the co-ops have their tonnage guaranteed under membership contracts will be covered as to any tonnage offered." [1336]

Co-ops being, I suppose, Sunmaid.

Now, Mr. Smith, did this message in letter form convey to you the information that the packers were necessarily short at this time—take the word "necessarily" out—were short at this time?

A. It conveyed a statement, a certain—a message, and that packers generally, as independent packers, were generally short.

Q. Did you or didn't you believe that?

A. I had no independent source as to the actual facts with respect to the position of individual handlers, sir. If, as a matter of our regular operations, we get a lot of reports and information in with respect to a particular situation, and we—some serve as a check on the other, and we try to conclude, arrive at a conclusion as to what the situation actually is without having the benefit of specific facts or data on the subject.

But this was obviously the representations of one individual with respect to the situation.

(Testimony of S. R. Smith.)

Q. Made on behalf of others, though, too, wasn't it, in the industry?

Mr. Fruit: I object to that, made on behalf of others, assumes a fact not in evidence.

The Court: You did have information from others of a comparable nature, did you? [1337]

The Witness: Well, Your Honor, I don't recall at this particular time of receiving similar communications to this.

Q. (By Mr. Dinkelspiel): Did you have any reason to disbelieve this statement of Mr. Grady's that:

"Therefore, unless there is a radical change in the situation in the next few days, packers' offerings in response to invitation to bid will be substantially short sales * * *"

Did you have any reason to disbelieve that?

A. I can only take it, sir, as the representations of one individual, and I had no reason for questioning what Dwight Grady was representing to me.

Q. Did you care?

A. Well, sir, I can truthfully say that by inviting packers to offer that a change in the situation would take place before those offers were accepted by the Department. And I say to that because that was the only way that I could see that the thing that the Department was trying to do on behalf of the raisin producers would be effectuated, namely, that using the facilities of packers that the Department would lift off a part of the available supply of raisins.

Q. Well, Mr. Smith, you said a while back that

(Testimony of S. R. Smith.)

this was only a statement. You also said, I believe, you had no occasion to believe or disbelieve it. You had, did you not, in the Department of Agriculture and CCC a record of raisin [1338] sales available to you at that time? A. We did not, sir.

Q. You had no record available to you when you put this program into effect, when you called for bids and when you talked about raising prices?

A. That's nothing unusual or surprising.

Q. It is unusual to me as a citizen of the United States to hear it, Mr. Smith, from you, but if it is nothing unusual, why, I will not question you any further about it. Sometimes we learn things in unexpected places and at unexpected times.

Mr. Smith, let's go back one step further. Refer to your telegram, please, to Mr. Grady. That is exhibit No. 8. You referred to the speech at Fresno on August 4, the press release of September 5 and the Secretary stated that:

"Dried fruit prices would not be supported at fixed levels."

Then you reject the Webb-Pomerene suggestion. Then you say:

"The program as announced is substantial contribution towards stabilized conditions within dried fruit industry. We solicit and expect receive cooperation Rosenberg and other packers in making it a success."

You were questioned yesterday by what you

(Testimony of S. R. Smith.)

meant by the word "co-operation", and over my objections you were permitted to paraphrase that word and did so in rather grandiloquent [1339] phraseology. I want to read to you what you said the word "co-operate" meant. I am not reading from page 1228 of the transcript, starting with line 18:

"* * * but as far as the meaning of co-operation in this instance was concerned, if I may be permitted to say, it reflected two thoughts. 'Let's quit fussing about what has been announced in the way of a program and recognize that the Commodity Credit Corporation is elected' "——

I assume that is supposed to be "has elected"——

"——to use the packers as a vehicle through whom aid to producers was to be accomplished and to effect that object if packers, including Rosenberg, should get out and get busy and buy raisins."

Now, when you made that statement to co-operate in your telegram of September 12, and when you used "co-operate" in such an expansive fashion as you have testified to, that they were to get out and get busy and buy raisins, you knew, did you not, that they did not then have raisins?

A. At the time that that wire was written, the only report or information on packer position with respect to raisins was—were the communication—it was a communication from Mr. Grady under September 9. If my memory serves me correctly, his letter, under date of September 10——

Q. (By Mr. Dinkelspiel): You have got it before

(Testimony of S. R. Smith.)

you. You [1340] don't have to rely upon that memory of yours.' A. No, pardon me, please.

Q. You got in front of you.

A. Yes. To the best of my recollection I didn't actually, hadn't actually, received the letter at the time of preparing, or preparing the wire to Mr. Grady.

The Court: May I see the wire?

Q. (By Mr. Dinkelspiel): Well, when you told him to go out and get busy and buy raisins you had something in your mind he didn't have raisins, didn't you?

Yes, or no, before the speech.

A. Accepting.

Q. Yes; or no:

A. Yes, but I would like to explain my answer.

Q. I only asked you if you had an inkling, or not, that he had raisins at that time when you told him to go out and buy them. It doesn't call for an explanation.

Your Honor, counsel—I am referring——

Mr. Fruit: Your Honor, may the witness have an opportunity to explain?

Mr. Dinkelspiel: Your Honor, these long speeches are getting awfully tedious for answers that only call for a yes, or no.

Mr. Fruit: The question with respect to an inkling in a field such as this——[1341]

Mr. Dinkelspiel: Shouldn't he bring this out on redirect?

(Testimony of S. R. Smith.)

Mr. Fruit: He cannot be compelled to answer yes, or no.

Q. (By Mr. Dinkelspiel): There was a deposition taken of Mr. Smith in Washington, D. C., on July 22, 1953. I am referring, counsel, to that deposition, and Mr. Smith, at page 10 in that deposition you were asked by Mr. Ehrlich this question, line 9:

"On or about September 5th, 1947, when the program for the purchase of raisins was announced, was it any matter of interest or concern to you who held and owned the raisins at that time?

"Answer: Actually, Mr. Ehrlich, I am not sure, as of this date, to what extent that entered into any consideration which I personally might have given the problem concerning the raisin producers."

And then it is corrected to read:

"We were aware that the season was opening and that, as a matter of general practice on the part of the industry, trading between producers and packers was commencing, and from that I would add that we were generally aware that for the most part the producers were still in control of the raisins, that they were in the process of [1342] making or had made."

And thereafter there is added, apparently as a correction in ink, by the witness:

"However, we had no way of knowing the manner of extent to which growers had raisin tonnage under contract with packers."

Now, that testimony was given by you, was it, Mr. Smith? A. It was.

(Testimony of S. R. Smith.)

Q. Yes. And that correction of the last sentence being added was a correction made by you after you had read the deposition?

A. That is [1343] correct.

Q. Now, let me ask you, is it true that as the season was opening you were generally aware that for the most part the producers were still in control of the raisins?

A. That was my general impression, sir.

Q. Well, not to be at all critical, but I am having a little difficulty between when you have impressions and when you have opinions and when you know the facts. You told me that the Fruit and Vegetable Branch did not, in the fall of 1947, keep up with the extent of purchasing and selling of raisins in the San Joaquin Valley.

A. Sir, in 1947 I know of no agency that undertook to assemble from packers information as to their receipts of new crop raisins, the purchases that they had made under firm contract, purchases that they had made under open contract, that type of factual information was not available at any time.

Q. That was not the question asked you, either, just previously or earlier. I am asking you whether you had information, your Fruit and Vegetable Branch or any other part of the Department of Agriculture, of the extent of purchases and sales in the San Joaquin Valley of dried raisins in early September?

(Testimony of S. R. Smith.)

A. We had no information which would tell me, or anybody else, the exact quantities that were being bought and sold, sir.

Q. Did it tell you the approximate [1344] quantities?

A. The best that I can recall, not the approximate quantities.

Q. How did you know, then, whether sufficient raisins were being purchased to relieve a surplus, if you knew? A. Purchased when, sir?

Q. During this period in the fall of 1947.

Mr. Fruit: I object to that; it is too general.

The Court: Overruled. You may answer.

A. Will you read the question, please?

(Question read by reporter.)

A. We had, as we do, as a matter of course, I would say, three general sources of information. And by "information", your Honor, I don't mean actual compilations of purchases by packers and sales by growers.

One is the Market News reports that are issued periodically. Two, conversations, letters that we have and had with industry representatives. Then, too, we have several—the branch has several offices here on the coast, and they, in turn, supply us with information that they are given by members of the industry as to the situation actually prevailing.

Q. Well, Mr. Smith, then there is made available to you, or there necessarily must if you are to render a good public service job, periodic reports

(Testimony of S. R. Smith.)

as to the number of raisins being purchased and sold during any given period of time during the year?

A. Well, the only reason I can't say yes to that question is, [1345] when you say "quantity", because to my knowledge during that year there weren't any reports which gave the actual quantities. That is all I am trying to say, but in terms of information in the way of reports that individuals in the industry gave us, yes, in a general manner but not a specific manner.

We say in dealing with these industry groups and operating these programs by virtue of talking to people and receiving reports I have indicated we get, we acquire, what we refer to as the "feel" of a situation, and I can't translate that into specific quantities. I am not trying to quibble with you; I am merely trying to——

Q. Well, Mr. Smith, you at the Washington level, or the Fruit and Vegetable Branch in San Francisco—there was one, was there not, in 1947?

A. We had a field office.

Q. If they were told that raisins in the week of September 10th sold at $125 to $135 a ton, would there be information submitted to you or to them, to your knowledge, that would show approximately how many tons were sold that week?

A. No, we didn't have that information.

Q. Well, then, you didn't know, ever, if the market was a nominal market or an actual market, did you?

(Testimony of S. R. Smith.)

A. Well, other than what the current reports so made would reflect on that situation.

Q. Do you mean to tell his Honor that the head of the Fruit [1346] and Vegetable Branch of Production and Marketing Administration of the Department of Agriculture didn't know in any specific week or any specific day when he was handling a price support program whether the markets were nominal and what the prices that fruit was being sold for? Do you mean to tell that to this court room?

A. My answer is yes. It is an honest [1347] answer.

* * *

The Court: Well, counsel, here is the situation as it appears to me. This gentleman, who is skilled, with a long background, and in whom this Court should have confidence, had occasion to write a memorandum to your immediate superiors as well as the Department, itself, wherein you made certain basic recommendations.

After observing you on the stand, your careful, precise method, I am quite well satisfied that that memorandum was not written hastily, nor was it written otherwise than as a memorial of your views, which views were obtained in the light of conditions which were then current, and perhaps then more significant to you than they are now and the impact was felt perhaps more keenly then than you feel it now in the light of the events as they unfolded before you. [1355]

(Testimony of S. R. Smith.)

Now, that memorandum, I take it, was not written in an hour or two hours. It was written after a very careful study.

You made certain recommendations. Now, apparently, the information which you had then is not before you now, is that correct, sir, or do you desire to recede at all from the position which you then announced?

The Witness: No, I have so stated, your Honor, and I don't think——

The Court: I don't say that in reflection, sir. I just mean that in the light of events.

The Witness: No, that memorandum was prepared after my return from Montana. I spent two or three days or more canvassing what had happened in the interval that I was absent, took stock, if you please, of information available to me, and to those who worked with me in developing that memorandum and proposal. We had a lot of wires, letters; my fellow employees had gotten a lot of phone calls, there had been communication with our offices out here, we had available the market news reports that had been issued up to that time.

Out of all of that type of information flowing to us was the basis of that memorandum, and to the best of our knowledge, and our belief, we were presenting to the Commodity Credit Board the information that we thought reflected the situation which obtained, and if I have given the Court any indication of receding from what I represented then, I apologize.

(Testimony of S. R. Smith.)

The Court: Well, I say this again quite respectfully to you. There was one instance wherein you took the position that the nonavailability of a market was due to the processors rather than the growers, and in your memorandum you may recall that the responsibility you placed was a joint one.

The Witness: Yes.

The Court: That was one recession that you made from your memorandum.

The Witness: Well, I was subsequently asked a question, I think by Mr. Dinkelspiel, whether the growers' activity also contributed to the situation and I answered yes.

The Court: Yes, testified that in your opinion the non-availability of the market was due to the fact that the processors were not bidding, and your memorandum is directly opposed to that contention, that statement. So I wondered, in the light of not certainly an equivocal situation, but perhaps a refinement that perhaps there was additional information you had to fortify that memorandum that would edify any record.

I say to everybody in this court room, this is not an easy problem. I have had many difficult problems before me, but this is a very difficult case.

Mr. Fruit: Your Honor, may I say I think you are referring to a question I directed to the witness. It was my purpose to direct him to one of the factors making a market, not to all of the [1357] factors.

* * *

(Testimony of S. R. Smith.)

The Court: As further illustrative, this gentleman, after very carful study, recommended renegotiation. Now, that was not done cavalierly, nor without any basis, and it would seem that in the interval there must have been facts justified.

Mr. Fruit: May I say——

The Court: Am I correct in that, sir?

The Witness: I thought I had very good reasons for so proposing, your Honor, or I wouldn't have made the proposal.

The Court: I am sure you wouldn't. [1360]

* * *

Mr. Fruit: * * * Now, I would also like to have marked for identification the photostatic excerpts from the minutes of the October 9, 1947, meeting of the Board, Commodity Credit Corporation, at which the increase of the purchase program was considered and acted upon.

I may say with respect to that that a thorough search has disclosed no written docket submission—submission to that meeting.

Mr. Dinkelspiel: In this connection, your Honor, I have no objection to the document and record of the proceedings of the Board, provided that no contention is made that the contents of this document, or the change in program— [1365] the contents of the minutes of the change in program therein referred to was conveyed to the plaintiff in this action prior to its submission of its second bid on October 14, 1947. [1366]

* * *

(Testimony of S. R. Smith.)

Mr. Fruit: I am not hedging. I will stipulate that these minutes were not communicated——

Mr. Dinkelspiel: That is not my question; that is not my question, and I am going to stand on the objection——

Mr. Fruit: ——to the Plaintiff. [1368]

* * *

Q. (By Mr. Dinkelspiel): Isn't it a fact, to your knowledge, Mr. Smith, that the raisins in California are not made, or are not—in other words, are not completed so that they may be put in lug boxes for shipment before the middle or latter part of September?

A. As a normal thing, it has always been my understanding that not too many raisins become available until—a new crop do not become available until toward the end of September.

Q. Now, you testified the other day that in your opinion the packers could have covered their position through the use of options, did you not?

A. Yes, sir. [1375]

Q. Do you know whether options can be used from a practical point of view until the crop is made?

A. I have no basis for saying that they couldn't be, sir.

Q. Except maybe your common sense might tell you they couldn't be?

A. No, I couldn't agree to that.

Q. Have you ever heard of an option being given for raisins before the crop was made?

(Testimony of S. R. Smith.)

A. In answer to that question, I have not.

Q. And when you were answering question that the growers might have protected themselves by options, you were answering your counsel, who quoted from Exhibit 44, and was referring to options in May, 1948, isn't that correct?

A. That is correct.

Q. And you wish the Court to believe that the growers—that the packers in this case could have protected their position in September of 1947 by the use of options?

A. I frankly see no reason why they could not have.

Q. Wouldn't it be better to say "I frankly don't know"?

A. I can't answer that question in that way, Counsel.

Q. You can. I ask you that question, whether in all honesty you had not better say "I don't know"?

A. Will you restate your question, please?

Q. I don't press the question. Now,——

The Court: Before passing, if I may interrupt you, [1176] this matter of options, would you define for me, Mr. Witness, what you have in mind under the option and how it may be exercised?

The Witness: The packer would go to the growers who either had raisins or were in the process of making raisins, and enter into an understanding with such growers that in the event an offer made to the Corporation—that he would make

(Testimony of S. R. Smith.)

to the Corporation was accepted, that he would obtain from that grower the agreed-to quantity of raisins at an agreed-to price.

In the event his offer was not accepted, then the packer would be absolved of consummating that option.

Q. (By Mr. Dinkelspiel): Mr. Smith, it is inherent in this protection of the packers in your scheme of thinking on this matter that the price be set in the option, is it not?

A. That is correct.

Q. Because without a price the packer isn't protected?

A. That is correct.

Q. Now will you state whether or not to your knowledge there was a Raisin Producers' Association active with the producers of raisins in the San Joaquin Valley in the month of September, 1947?

A. There was an organization known as the Raisin Producers' Association.

Q. And there was a very active personality at the head of [1377] it, a man named Setrakian?

A. Yes.

Q. And you know, do you not, for a fact, that he was urging the producers not to sign up at less than a parity or 90 per cent of parity?

A. Yes, his counsel to producers was that what they should get for their 1947 crop was either 90 per cent of parity or parity.

Q. And that would be what in dollars and cents per ton?

A. Which would be between—Well, parity at

(Testimony of S. R. Smith.)

that time was a little over $160 a ton, and whatever arithmetic of 90 per cent of it would constitute. The other figure that was commonly used at that time was $150 a ton.

Q. Now, Mr. Smith, would you honestly have expected growers to sign up at a figure substantially less than that on options to a packer when this vigorous opposition was going on in the month of September, 1947?

A. Well, as I remember, sir the vigorous opposition on the part of producers, that came a little later. Now,——

Q. I beg your pardon, later?

A. The real opposition and pressure, as I remember it, from the producer group came in several stages.

The first one was right after the announcement of September 5. The next period of objection and protest pointed up right after the first offers were submitted by [1378] packers and up through the date of their acceptance, which I think has been stated to be September 24, as I remember it.

Then a fourth period, I would call it, from that date until the announcement of the increase in the tonnage to be bought and the changes that were made in the program.

Q. That was after the mass meeting early in October that Senator Downey has testified to?

A. Yes, that is the period that I have reference to in this last instance. Then at least a fourth period of grower activity and expression which took

(Testimony of S. R. Smith.)

place—I'd say along about October 17th until in November.

Q. While we are at it——

A. Now with reference again to the specific question you asked me, the record will show that despite this agitation on the part of the growers—I don't want in any way personally to minimize the fact that there was an important factor in the situation that year—that the prices as reported by the Market News Service representing sales by growers to packers was considerably less than what the growers, through their spokesman were insisting should be established, and in that instance I have reference to what the market situation was from about the middle of September on.

Q. But Mr. Smith, before you get too far afield in this [1379] very lengthy explanation of a rather simple point, you have already testified that you had no knowledge as to what depth there was in this market quotation. It might have been one ton or 5,000 tons that was being quoted, isn't that correct, or are you going to now tell the Court that you had some knowledge?

A. No, no, in that we had no information other than what we got from the Market News Reports and what packers and others were telling us about the magnitude——

Q. You are not telling us now that you had any information—any more knowledge at that time than you told us about last Friday, is that correct? You

(Testimony of S. R. Smith.)

haven't acquired more information retrocatively since last Friday, have you?

A. No; I have not.

Q. Well, we will accept your testimony as of Friday last on that subject. Now let me ask you this, Mr. Smith: Is this true or correct, and I am reading from a newspaper account with the Washington dateline of September 12:

"Raisin grape growers of the San Joaquin Valley today, September 12, were urged by A. Setrakian, the President of the Raisin Producers' Association, not to be stampeded into 'selling their crop at ruinous prices.' Setrakian said he talked by telephone"——

Well, that—is that a true and correct statement to your knowledge? [1380]

A. What was the date of that, counsel?

Q. September 12, 1947.

A. Well, to the best of my recollection he was talking most of the time, and I imagine he was talking on that day, too.

Q. That is probably correct. He was a very forceful person, wasn't he?

A. Very forceful and very active, sir.

Q. And was his testimony aiding the purchasers of raisins in buying them during the month of—194'—during the month of September, 1947, and the early part of October, '47? Let me withdraw the question and make it simpler.

Was his activity aiding or hindering the purchase in a free market of raisins in September, 1947, and early October, 1947?

(Testimony of S. R. Smith.)

A. His activity would go to keeping growers from making sales of their raisins.

* * *

Q. Well, maybe it was Senator Anderson who made that statement. Let's get to the Rosenberg Bros. bid. When Rosenberg Bros. bid at $151 a ton in the condition of this market then known to you in September, could you possibly have believed that Rosenberg Bros. had the raisins then on [1381] hand with which to fulfill that bid?

Mr. Fruit: I object to that, it asks whether he could possibly have believed, not whether he did; conjectural.

Q. (By Mr. Dinkelspiel): Did you believe? I will frame the question as did you believe that Rosenberg Bros. had all or substantially all of the raisins on hand with which to meet that bid?

A. I didn't know whether they did or not, but when first offers were received in view of the total quantity that was offered, indicated to me that packers were apparently offering in excess of what they had actually bought and I can't——

The Court: May I have the date again on that? That was September?

The Witness: September 24th. But I can't testify, Counsel, with respect to any one individual firm.

Q. (By Mr. Dinkelspiel): I would like to ask this question as a matter of general information: Did the Government wish to get high bids or low

(Testimony of S. R. Smith.)

bids when it asked for bids? Can you answer that question? A. I can answer it for myself.

Q. Yes; as a matter of information that is interesting to me, and I think to the Court.

A. Those of us at the operating level were hoping that the first offer would result in helping establish a field price [1382] for raisins, Natural Thompson Seedless, of about $130 a ton. I personally wouldn't have been disturbed if it had been $125 a ton, but the reflection of the first offers, particularly the acceptable ones, namely, the lowest price offers, as we saw it, didn't reflect any $125 or 30 dollars per ton.

Q. The bid price indicated that? A. Yes.

Q. Having in mind what your objective was, that the offers reflect the $130 or 35 dollars or even $125 per ton, I will ask you whether the offer of Rosenberg Bros. to cancel these contracts and at the same time to cancel any purchases from growers at less than $140 per ton, which offers were made on October 15 and 16, 1947, whether those offers were not offers satisfactory to this program that you were trying to work out? Do you understand what I mean?

A. I think I do, but you skipped a rather important interval of time when you asked me that question.

Their proposal, counsel, as set forth in the evidence and the record, was $140 per ton to producers. I can say for my part that to undertake to establish

(Testimony of S. R. Smith.)

the market at that level, I thought, was a little on the high side.

Q. Well, they didn't offer to establish a market. They offered to release anything purchased under that price. Would you mind reading the question, please? [1383]

(Question read by Reporter.)

Mr. Dinkelspiel: Do you understand now or not? If not, I will reframe it.

A. Would you, please?

Q. Yes. You have told us, Mr. Smith, and I believe in all sincerity that you hoped to get packer bids that would reflect a purchase from the growers at $130 or $135 per ton, or even $125 per ton?

A. That is right.

Q. So when the packer bids came in, and this applies to all that were accepted, Rosenberg, Sun-Maid, all of them, none of them reflected a purchase of natural raisins at $125 or better, right? Are we in accord so far?

A. Except tabu offers, that is correct.

Q. Did not reflect that price. Now, I say that when Rosenberg Bros. comes to the Government or comes to Commodity Credit Corporation and the Secretary of Agriculture and says, "We will cancel our bids and at the same time cancel any purchases we have made from growers under $140 per ton," whether Rosenberg Bros. wasn't actually co-operating in the very program you were trying to carry out, in your opinion?

(Testimony of S. R. Smith.)

A. In my opinion, yes. [1384]

* * * *

Redirect Examination

By Mr. Fruit: [1385]

* * *

Q. (By Mr. Fruit): Did you prepare that memorandum, Mr. Smith?

A. I did not draft all of it, but I would like to explain the preparation of the memorandum, if I might.

Q. Go ahead.

A. I previously testified that during an interval of time extending from approximately September 8 to on or about or October 8 to on or about October 19 or 20, I can't recall specifically, I was out of the City of Washington. Upon my return I acquainted myself with what actions had been taken with respect to the raisin program, and having learned what actions had been taken it was my view, after rather thorough and extended discussion with my, the associates in my Branch, that I should undertake to lay the problem before the Commodity Credit Board again and see whether I could prevail upon the Board to affect what I considered some necessary and important changes in that program. I conferred at length with members of my branch and outlined with them the content of a memorandum that I desired to submit to the

(Testimony of S. R. Smith.)

Administrator; also outlining the course of [1388] action that I thought should be taken.

At the conclusion of those discussions, a draft of the memorandum was prepared and submitted to me, and I undertook personally to edit and rework portions of it, those portions being the—on this exhibit, principally on the last page where I was trying to point up the reasons for undertaking a change in the program and the urgency for so doing.

Q. You're referring particularly, are you not, to the last paragraph of the memorandum?

A. Well, I wouldn't confine my own composition to the last paragraph. I would say the next to the last paragraph, and some in the third to last paragraph, and on Page 2 where it says:

> "In view of the foregoing it seems advisable to give consideration to further changes in the purchase program."

the points of A, B and C were also scrutinized very carefully by me, and I did discuss with my associates the remaining content of the [1389] memorandum.

* * *

Mr. Fruit: Your Honor, that is the situation of the record. The situation of the record is, so far as we have been able to understand it—let me make this statement to you, tender it as a stipulation, in fact.

We specifically directed inquiries over the week

(Testimony of S. R. Smith.)

end to Washington about this particular point, and I discussed it with Mr. Smith, and the only record we have is that consideration of this docket was deferred.

Now, we have no record available to us that the docket was ever further acted upon. It would appear that when the direct purchase program was adopted the export payment docket was simply allowed to lapse.

Mr. Dinkelspiel: If you tell us no action was taken on it I will accept your statement, counsel.

The Court: Nothing happened on it, at least?

Mr. Fruit: That is correct. [1407]

* * *

ALBERT ARNOLD

called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

The Clerk: Please state your name, your address and your occupation to the Court.

The Witness: My name is Albert Arnold. My home address is 260 San Anselmo Avenue, San Francisco. My business address is No. 1 Drumm Street, San Francisco. I am engaged in the dried fruit business.

Direct Examination

By Mr. Fruit:

Q. Mr. Arnold, are you presently connected in any way with the plaintiff in this action, Rosenberg Bros. & Co., Inc.? A. No, sir; I am not.

(Testimony of Albert Arnold.)

Q. Were you connected with that firm throughout the year 1947?

A. Yes; I was.

Q. What was your position with the firm at that time?

A. Vice President and Domestic Sales Manager in charge of sales of dried fruits and nuts. [1411]

Q. How long had you been with the Company?

A. 30 years.

Q. When did you leave the Company?

A. I left in January of 1948.

Q. Mr. Arnold, tell the Court, if you know, tell the Court whether or not Rosenberg, to refer to Rosenberg Bros. & Co., at that time had adopted, prior to September 1, 1947, a selling policy with respect to the anticipated 1947 raisin crop season?

Mr. Dinkelspiel: If you know, Mr. Arnold.

The Witness: I would have to go back a little ways to lay some groundwork for that answer.

Mr. Dinkelspiel: Your Honor please, this is a witness who ultimately may prove to come in the category of a disgruntled employee, and I don't care to have him make any voluntary statements, your Honor.

Q. (By Mr. Fruit): I would ask the witness, if he knows, to tell the Court whether prior to September 1, 1947, Rosenberg had adopted a selling policy in anticipation of its 1947 raisin crop operations?

Mr. Dinkelspiel: Yes or not, Mr. Arnold.

The Witness: Yes.

(Testimony of Albert Arnold.)

Q. (By Mr. Fruit): What policy had been adopted?

A. Along in the summer we concluded that it would be advisable not to support the raisin market and to try to get as much [1412] business as we could, if necessary, to sell short.

The Court: Pardon me. Would you state the time, generally, when these events transpired?

The Witness: Yes; I would say that policy was decided along in June or July.

The Court: 1947?

The Witness: Before the start of the active trading season of the 1947 season. [1413]

* * *

Q. (By Mr. Fruit): Please tell the Court, if you know, whether short-selling was a common business practice pursued by Rosenberg in 1947 and the other years you were with the firm?

A. Well, when we felt the situation was such that a short position would be profitable, we took a short position, if we could, and if the contrary were true, why, we went along with it at the particular time. Our policy was flexible, according to the conditions as we saw them. [1414]

* * *

Q. Do you recall the occasion of the discussions or negotiations that you referred to a few moments ago for the determination of Rosenberg's bid on the first Government announcement?

A. Yes; I do so recall.

(Testimony of Albert Arnold.)

Q. Who were present at the time?

A. Mr. Oppenheimer called a group of men into his private office for consultation. I know that I was present and I believe Mr. Grady, Mr. Ehrenfeld, and Mr. Chris Zobel. [1416]

* * *

Q. (By Mr. Fruit): Will you state the conversation between the parties present at that time as well as you recall, Mr. Arnold?

A. Well, as near as I recall, Mr. Oppenheimer called a number of the men in the various departments into his office and on the afternoon, which I believe was the day the bids were to be filled, or the preceding day, and asked for our opinion as to what prices we felt the firm should bid on this contract.

We had been familiar at that time with the announcement by the Government that they were going to purchase a quantity of raisins and the various men, for the most part, put down their prices, calculated the price they thought we should bid. And we turned over our slips of paper and reported to Mr. Oppenheimer what the prices were and we were all at [1418] variance with the figure he had in mind, and he gave us the figure which he had intended to bid, and after a very brief discussion at least several people, I believe, that I know I was in sympathy with the price he intended to bid, and the matter was closed pretty much then and there, and the bid went in. [1419]

* * *

(Testimony of Albert Arnold.)

Mr. Dinkelspiel: Are you reporting a conversation or an opinion?

The Witness: I am reporting a conversation.

Mr. Dinkelspiel: You made these statements?

The Witness: That is right. I am giving you—repeating an outline of what happened at that time. And I felt that the demand for raisins in the domestic markets was going to be lighter than normal, and I felt we should try to get as much of the Government business as possible. I don't know whether I am permitted to make the statement or not, but Mr. Oppenheimer on his part made the statement that he felt that Sun-Maid Raisin Growers would have difficulty in selling their raisins of that crop and therefore they would be apt to name a very low price and in order for us to qualify under the bid it would be necessary for us to bid a price lower than the then prevailing market to the domestic trade after deducting the brokerage and discount that is normally paid on domestic sales.

His price was, the price which he intended to bid, was a [1421] few dollars a ton lower than the figure that I put in, but I subscribed to the views that he had as to the Sun-Maid position, and I felt that his judgment was correct, and we should go along at the price he bid. [1422]

* * *

Q. Do you know whether or not Rosenberg during parts of September and October, 1947, stayed out of the market, as the phrase goes?

(Testimony of Albert Arnold.)

A. Well, as I recall, we were selling raisins at prices more than the growers wanted, or had an idea that they were going to obtain, with the result that we refrained from making fixed price contracts, and acquired as much merchandise as we could under so-called open-priced contracts.

Q. Mr. Arnold, you began your answer by saying, "We were selling raisins at prices"——

A. That is right.

Q. You mean, selling or offering to buy? I don't understand quite——

A. We were making sales almost daily of raisins without covering those sales at fixed prices. And one reason for it was that the selling market was lower than the buying market.

Q. I see. If you know, did Rosenberg use open price contracts in this period, or did it not?

A. Yes; it did.

Q. For the purpose of forcing the market down?

Mr. Dinkelspiel: If your Honor please, I object to the question as incompetent, irrelevant and immaterial. This [1424] witness is not competent to testify to any such thing nor is there any evidence to that effect before the Court.

The Court: Overruled.

The Witness: I would say that the effect of the open price contracts generally was to drive the price down. And there was a definite benefit in having merchandise on the open market price contracts, if you were taking a short position.

Mr. Dinkelspiel: May I have that answer?

(Testimony of Albert Arnold.)

The Witness: It was a definite advantage to the seller in having merchandise under an open price contract if the seller was taking a short position.

Q. (By Mr. Fruit): What would that advantage be, if you know, Mr. Arnold?

A. Well, when you sell merchandise for a certain period previous to shipment, you are called upon to make delivery during that period, and if you have merchandise on an open-price contract, you're permitted to make use of that merchandise in fulfilling your orders without going on the market to buy the goods.

In other words, you can defer the actual acquisition of the merchandise from the standpoint of prices. You are not a price buyer, you are simply taking it on an open-price contract for the prices to be fixed later. The effect is to remove the buying power from the market, and at the same [1425] time get the merchandise you require for filling your order.

* * *

Cross-Examination

By Mr. Dinkelspiel: [1426]

* * *

Q. Mr. Arnold, you are in the dried fruit business now, aren't you? A. That's correct.

Q. Now, isn't it part and parcel of the dried fruit industry to try to operate at a profit?

A. Naturally.

(Testimony of Albert Arnold.)

Q. The profit motive is active there as it is in any other industry? A. That is correct.

Q. And if in the judgment of yourself you will come out better by taking a long position in dried fruit commodity at a certain time, you will take a long position, will you not? A. Correct.

Q. And if it is in the interests of you or your associates, [1428] if you have them, to take a short position, your good business judgment will dictate a short position? A. That's correct.

Q. And so what you are telling his Honor is that in September of 1947, after the announcement by the Secretary of the Treasury of Agriculture, Mr. Oppenheimer, you and others concluded that it would be in the interests of Rosenberg Bros. to take a short position?

A. That is absolutely correct.

Q. And you estimated in your own minds the price at which the short position could be covered?

A. Correct.

Q. And having so estimated it then you came up with your respective ideas on what the bid should be? A. That's right. [1429]

* * *

ARTHUR C. OPPENHEIMER, II

called as a witness on behalf of the Government, sworn.

The Clerk: Please state your name, your address and your occupation to the Court.

The Witness: My name is Arthur C. Oppenheimer, the 2nd. Address is 25 California Street. I am in the food processing business associated with Henrietta Rancho products.

Direct Examination

By Mr. Fruit:

Q. Mr. Oppenheimer, are you presently connected in any way with the plaintiff in this suit, Rosenberg Bros. & Co., Inc.?

A. I am no longer associated with the firm. I have business dealings with them. I happen to be a co-trustee of a trust with one of the officers. I think that explains fully my position with the plaintiff.

Q. Thank you. Were you connected with the firm Rosenberg Bros. & Co. in 1947 and 1948, Mr. Oppenheimer?

A. Yes; I was. I was an officer of the company.

Q. What was your position?

A. I was vice president in charge of production. I was with the firm until 1952. [1447]

* * *

Q. Thank you. Tell the Court, if you know, what the amount was which Rosenberg figured it should have above its natural condition raisin costs to cover.

(Testimony of Arthur C. Oppenheimer, II.)

or as its margin, above those costs in its general business in 1947-1948?

A. A general rule of thumb used by the company in arriving at an approximate sales price was a figure commonly used of $35 a ton which would be applied to the natural condition raisins as one item. The final figure would be determined by competitive factors at the time. If it could be more, the company was not adverse to taking a greater profit. Sometimes they figured they could not get the full amount, and have to be less.

Q. Was that true of its government sales also?

A. I would say generally you could not get a full packing fee on government orders because of the competition that you are up against in placing your bids.

Q. Do you know whether or not that $35 figure, sometimes known as an arbitrary or margin, included profit? A. Yes, it did.

Mr. Fruit: May I have this marked for identification, please?

The Clerk: Defendant's Exhibit O for identification only. [1449]

(Thereupon the memorandum from ACO to S. Waldo Ashby, dated May 28, 1948, was marked Defendant's Exhibit O for identification.)

Q. (By Mr. Fruit): Mr. Oppenheimer, I have here a copy of a memorandum, apparently from ACO, to S. Waldo Ashby, dated May 28, 1948, marked

(Testimony of Arthur C. Oppenheimer, II.)

Defendant's Exhibit O for identification. You recognize that? A. Yes; I do.

Q. Will you tell the Court briefly what it is, or what the original of which it is a copy was, if you know?

A. Well, it was an endeavor on my part to find out what our average costs of producing raisins had been over the previous season, excluding an exceptionally long run made for the government early that year. That was the intent of the memo I sent to the gentleman who was then in charge of the cost figures.

Mr. Dinkelspiel: That also was true of prunes, is it not, the memorandum said prunes and raisins?

Mr. Fruit: Yes; both prunes and raisins.

Mr. Dinkelspiel: Yes; both prunes and raisins, Mr. Oppenheimer?

The Witness: May I see that, please?

Mr. Fruit: Surely.

The Witness: Whether it is prunes or raisins, the same principle is involved. [1450]

Mr. Dinkelspiel: We have been talking about raisins here, so if it also includes prunes, we have to bring them in.

Mr. Fruit: Yes.

Q. That is, in short, a copy of the memorandum which you, as an official of the Rosenberg Company, sent to Mr. S. Waldo Ashby at the time stated?

A. That is correct.

Mr. Fruit: I offer that in evidence.

Mr. Dinkelspiel: Your Honor please, at the time

(Testimony of Arthur C. Oppenheimer, II.)

ent time I see no relevancy to this document. If counsel wishes to identify it and go further with it, that might be the thing to do.

Mr. Fruit: Well, I will be glad to do so by reading——

The Court: You refer to government orders in the generic sense, generally, I suppose, without commitment, to raisins or prunes, do you, Mr. Oppenheimer?

The Witness: Well, specifically in that memo reference is made to the large tonnage that had been delivered of raisins that we are referring to here that were delivered, I believe, in February of that year, where we were able to accumulate our run and ran for a considerable period at one time.

Mr. Fruit: Perhaps if I asked a few questions——

The Court: Who is Mr. Ashby?

The Witness: Mr. Waldo Ashby was then in charge of our cost studies that we had in our various plants and would assemble [1451] information for me.

* * *

The Clerk: Defendant's Exhibit O, heretofore marked for identification, now in evidence.

(Whereupon the document referred to [1452] above, previously marked for identification, was received in evidence and marked Defendant's Exhibit O.)

(Testimony of Arthur C. Oppenheimer, II.)

Q. (By Mr. Fruit): Mr. Oppenheimer, directing your attention to that exhibit, if I may, would there be any difference in the costs of handling prunes and raisins as of that time?

A. Sorry; I don't follow the time you have; between what periods are you talking about?

Q. Well, as of the time your memorandum was written. A. And what other period, please?

Q. Well, during that period would the cost principles, with respect to both prunes and raisins, have been the same as pursued by Rosenberg?

A. If I can try and interpret your question whether there is any difference between running long runs for the Government and running our domestic line, I would say there would be a difference in cost.

Q. Well, in the memorandum you state that these new figures, that is, the new cost figures for the coming season, should exclude the period when we were running on government orders. These figures should not enter into the average; this is an abnormal situation. If we do not exclude these low cost government runs we will be under pricing for the coming season on the normal commercial orders. Why were these government orders low cost, Mr. Oppenheimer?

A. Because of the size of them, where they could be run day [1453] after day, the same commodity, without changing our equipment over, the same labeling, there is an economy of operation which

(Testimony of Arthur C. Oppenheimer, II.)

is not possible with the type of domestic business we were doing.

Q. In short, the saving in cost resulted from the large volume?

A. Partly, yes. I could go on to say that it was easier to deliver on Government specifications than it was to our bakery trade, which we tried to be extremely careful on. [1454]

* * *

The Court: Pardon me, counsel. Did I understand the witness to testify that the item of $35 per ton was the differential between the cost and the processing—withdraw that.

Do I understand your testimony, Mr. Witness, that the sum of $35 ordinarily meant, represented your processing costs and your profit?

A. That is correct, when applied to your raw product, plus the normal shrinkage that you would expect.

The Court: Would that be applicable alike to Government contracts as well as domestic?

The Witness: Definitely. [1455]

* * *

Cross-Examination

By Mr. Dinkelspiel:

Q. Mr. Oppenheimer, you said that the differential is usually $35 after shrinkage; is that right?

A. That is correct. [1456]

(Testimony of Arthur C. Oppenheimer, II.)

Q. Now, the shrinkage factor is generally about what percentage of the sales price?

A. A figure—not of sales price, of your raw products, six per cent was a normal figure for figuring your stemmer shrinkage.

Q. So if you bought—pardon me.

A. (Continuing): Applied to your field price of your raisins.

Q. If you bought raisins at $110 a ton your shrinkage would be a little over $6 a ton, would it not?

A. That is correct.

Q. Which, if you included it, added it to your $35 a ton differential would mean a $41 a ton differential between the raw product and the selling product?

A. That application is correct.

Q. Just one other question about—I recall your father was, of course, the dominant factor in Rosenberg for many years, isn't that true?

A. That is correct.

Q. He ran the business, everybody knew it in and outside; isn't that correct?

A. That is correct.

Q. Over many years. And as you said, the trading position was one of the important problems of the firm and that was particularly the province of your father, was it not?

A. That is correct. [1457]

Q. And his skill was shown there, as it was shown in other ways, but particularly knowing when to buy and when to sell?

A. He controlled both the selling and buying.

(Testimony of Arthur C. Oppenheimer, II.)

Q. That is correct. Now, do you know whether your father made a decision as early as June or July of 1947 to sell the 1947 crop short?

A. At that period you did not know what crop would be in June. You referred to June, 1947?

Q. That is right; I refer to June, 1947, because we had a former employee of Rosenberg tell us that was done, and we question it on our side of the case.

A. I would say in June it is too early to tell what your crop condition is going to be.

Q. Is that true of July, too?

A. It would be hard for me to say whether it is going to be July or August, depending on the year and maturity, whether factors, market conditions, be numerous things enter into that. [1458]

* * *

Mr. Fruit: Will you mark these for identification, please, separately?

The Clerk: Defendent's Exhibits P and Q for identification only. [1460]

* * *

I offer these in evidence as bearing on the issue of the notice to the plaintiff, or the plaintiff's awareness of the change in program prior to October 11, 1947, which, as your Honor will anticipate, might be pertinent to one or two issues in the case.

Mr. Dinkelspiel: Your Honor please, the evidence is clear that by October 10 and by October 12 the plaintiff had already submitted its bid to Washington and the bid was before the

Department. These were communications reported in the Fresno Bee. If counsel wishes to establish the substance of what is reported, he or his predecessor had the opportunity to question Senator Downey on it. After all, Senator Downey was a witness in person, and if it is to prove the facts herein, these documents are completely inadmissible.

Counsel stops, I am sure, out of deference to time limitation, but——

Mr. Fruit: They are in the record, counsel.

Mr. Dinkelspiel: Wait a second. But let me just, as part of my objection, call his Honor's attention to the following in your Q for identification. Heading: "May reject bids." [1464] That is on page 2.

> "'In this connection, it is understood Anderson may reject or permit to lapse all bids submitted during the past week"

mind you, submitted, past tense——

> "——on the purchase of the second allotment of 31,000 tons of raisins and an additional tonnage of prunes."

Now, if your Honor please, in addition to everything else, the documents do not even show what counsel says they do, and I submit they are incompetent, irrelevant and immaterial for a limited purpose or any purpose. I object to their introduction.

Mr. Fruit: I submit them on the notice point, your Honor, for such weight as is proper. I expect to develop a legal argument upon the issue at the appropriate time.

The Court: Counsel, with respect to the second so-called contract, what bearing, if any, would these announcements have on Senator Downey?

Mr. Fruit: Well, let me suggest this, your Honor: It is the government's position that while the offer on the second contract was submitted on the 8th of October and it was accepted on the 13th of October, it could have been withdrawn at any time prior to its acceptance, being a simple offer under an invitation for the submission of offers, an invitation [1465] which contained no prohibition whatsoever against the withdrawal of the offer made pursuant to it at any time prior to the acceptance.

The Court: It was accepted by telegraphic communication, was it not?

Mr. Fruit: It was.

The Court: What was the date of that?

Mr. Fruit: October 13.

The Court: When you say the second contract could be withdrawn——

Mr. Fruit: Certainly at any time prior to sending of the second telegraphic communication.

Mr. Dinkelspiel: May I urge one more point? I grow a little bit, well, a little bit unhappy about the techniques of the government, not counsel for the government, but the government in this case. Let's see what happened. We have the second calling for bids, calling for bids to be submitted at the end of the day of the 13th of October. We had introduced this morning a very startling document to which I objected at that time; I withdrew my objection when I saw what the document really was. In fact

ing of the Board of Directors on October 8, post
poned to October 9, of the Commodity Credit Cor
poration, which is in evidence as Defendant's Ex
hibit M, it is this document that amends the prio
docket and increases the purchases of raisins fro
61,000 to 121,000 tons. There is [1466] no mentio
made to any of the persons whose bids are befor
the government at that time, or who came in late
On October 13, that night, the night of Octobe
13, they accept the bids and by telegram of th
14th, accompanied by an announcement, a forma
announcement, I think it is Plaintiff's Exhibit No
19, of this new program, and counsel now quotes
presents to your Honor two documents, two releases
so-called, in the Fresno Bee by Senator Downey say
ing he hopes to get relief for the growers, which h
says is warning to the packers.

Now, do our business people have to deal with th
government on that basis, secret action on Octobe
9, retention of our bids, acceptance of them on Oc
tober 13, and announcement of change in progra
at the same time?

Now, I submit, your Honor, if notice was to b
given, if there is any notice in the case, it shoul
have come from the Department of Agriculture, o
the Commodity Credit Corporation with whom w
and other packers had been dealing.

I submit the mere announcement in the press o
October 12 and October 10, while our bids wer
under submission, that Senator Downey, who, fo
some time, had been presenting the Raisin Growers
cause, had hopes for relief by enlargement of

program, or change in the program, is not notice sufficient to preclude the plaintiff from asserting its claim for breach of contract, or—implied or expressed.

I submit the document has no relevancy and should not be [1467] admitted to this proceeding.

Mr. Fruit: That objection clearly goes to the weight of the documents and not to their admissibility. I believe it to be well established that such newspaper stories are admissible on the issue for what weight is proper, and all the evidence to be given. I wish to say again that it has never been the Government's position that there were any such contract rights as are claimed now by the plaintiff in this case. And, further, that the Government was exercising sovereign discretionary activities and powers in its increase of the program. [1468]

Mr. Fruit: Certainly the Government did not consider that it was breaching any contract or changing a contract. It would not have expected to give notice contractually, therefore.

So I am not in a position in which I can go back and prove that the Government gave notice in this way, the situation being as the Government views it. I am trying to present the facts to the Court as best we can determine them now.

Mr. Dinkelspiel: Well, if Your Honor please, obviously counsel's statement precludes the admission of the documents. The Government's position is that there was no contract here and that there could be no contract because the Government was acting in a sovereign capacity. So I say to what

possible relevancy have a couple of newspaper releases to this theory?

Mr. Fruit: That is my theory of the case. I am entitled also to do the best I can to meet your theory of the case, Mr. Dinkelspiel.

You have attempted from the beginning to try to exclude evidence of mine which did not fit in with your theory.

The Court: They may be marked, counsel, for whatever effect you believe them to have, but presently I can't see any persuasive effect. Maybe you can change my mind hereafter, but these statements made by Senator Downey, however well conceived and meritorious his position may have been from his lights and probably was, could not possibly have a very significant bearing upon the outcome of this case. [1469]

Mr. Fruit: Well, to be entirely honest with you, I don't think so, either, but I think they are relevant; I think they are material. What weight they may be given to the ultimate valuation of the case is something else. [1470]

* * *

The Court: Because I want an all-out discussion on this phase. We have the intervention of the price support in November of $135 a ton, and whatever short positions were manifest prior to that time may have been spent at or about the time that the Government pegged the market. Now, we just can't blandly approach this record and make general statements without support, and hereafter I should

like you to indicate to the Court wherein there is any evidence that justifies the Senator's assertion that Rosenbergs and others similarly situated as processors attempted to gouge, as he put it, or in terms substantially the same, the producers. [1177]

* * *

WERNER ALLMENDINGER

a witness called on behalf of the Government, having been first duly sworn, testified as follows:

The Clerk: Please state your name, your address and your occupation to the Court.

The Witness: My name is Werner Allmendinger, A-l-l-m-e-n-d-i-n-g-e-r.

My business address is 1000 Geary Street, San Francisco.

The Clerk: What is your occupation?

The Witness: Occupation is, I am Chief of the San Francisco Marketing Field Office, Fruit and Vegetable Branch, United States Department of Agriculture.

Direct Examination

By Mr. Fruit:

Q. Mr. Allmendinger, what is your present position with the Government?

A. I am chief of the San Francisco Marketing Field Office, Fruit and Vegetable Branch, U. S. D. A.

Q. Were you in the Department of Agriculture in 1947 and 1948? A. I was.

(Testimony of Werner Allmendinger.)

Q. What position did you hold with the Department of Agriculture in January, 1948? [1483]

A. In January of what year?

Q. 1948.

A. January '48 I was an agricultural economist in the Western Marketing Field Office, Fruit and Vegetable Branch, then located in Berkeley.

Q. Were you at that time a contracting officer for the Department of Agriculture?

A. I was a contracting officer for the Commodity Credit Corporation at that time.

Q. Mr. Allmendinger, I hand you Plaintiff's Exhibit 32 and ask you if you recognize that as a wire that you sent Rosenberg Bros. & Co., on January 26, 1948?

A. Yes, it appears to be such a wire. [1484]

* * *

Q. (By Mr. Fruit): Do you recall whether or not after sending that wire you received a telephone call from a Mr. Dwight Grady, who was employed by Rosenberg Bros. & Co.? A. I do.

Q. What was the date of that telephone conversation, if you recall? A. January 27.

Q. January 27, 1948? A. 1948.

Q. Do you recall the substance of that telephone conversation? A. Yes, I do. [1485]

Q. Do you have any notes made at the time of the telephone conversation?

Mr. Dinkelspiel: I submit his testimony should be in first, he recalls the substance of it, your Honor.

(Testimony of Werner Allmendinger.)

The Court: Does he have any notes or memorandum?

Mr. Fruit: Yes, he does.

The Court: All right, he may resort to them.

The Witness: The answer to your question, "Do I have any notes," is yes.

Q. (By Mr. Fruit): You may use them for refreshing your recollection if you like.

Will you tell the Court the substance of your conversation at that time with Mr. Grady?

Mr. Dinkelspiel: Referring to his notes?

The Court: Counsel may examine them if he wishes.

Mr. Dinkelspiel: I thought they were un-transcribable the last time we had them.

(Colloquy between counsel; inaudible to the Reporter.)

Q. (By Mr. Fruit): Mr. Allmendinger, will you tell the Court the substance of your conversation with Mr. Grady at that time as you remember it, using the notes to refresh your recollection?

A. Mr. Grady telephoned me, as I stated, on that day, and the first point that he raised in connection with the night-letter of the 26th relating to these contracts was that he [1486] stated that the wire didn't say how long the extension was. That is referring specifically to my notes, and that is in reference to the time of delivery.

Then Mr. Grady brought up a reference to a conversation that he stated that he had had with See-

(Testimony of Werner Allmendinger.)

retary Anderson, and Mr. Grady advised me he considered that such understanding, that an understanding that he had reached with Secretary Anderson in that phone conversation had been repudiated. He didn't go into detail with me as to the nature of the understanding, and I have no notes on what it was.

Mr. Grady further advised me that the Secretary in the conversation with Mr. Grady had referred to Sun-Maid, and stated that he would take care of them, meaning Sun-Maid also.

Then Mr. Grady brought up the December 15 date, which is the end date of the free delivery period under the contract, 1647. I don't recall the particular connection that that end date reference came up with.

Mr. Grady further advised me in respect to the approximate price that they based their bid on, or the approximate price that they would need to buy raisins at to come out. The notes are not entirely clearly. They appear to indicate that the bid was based on certain prices that he had specified, and then he made reference to a price that they would have to cover at or had covered at.

Then Mr. Grady raised the point of responding to our, or [1487] to my January 26 wire, by a qualification, namely, using language such as: "Without prejudice to our rights regarding our conversation with the Secretary."

That is the substance of the conversation as I recall it and as is indicated in my notes.

(Testimony of Werner Allmendinger.)

Q. (By Mr. Fruit): Do you recall what you told Mr. Grady at that time?

Mr. Dinkelspiel: No evidence of what he said in his notes, is there?

The Witness: Well, I have no specific recollection of responding at that time to any of the points that Mr. Grady raised.

Q. (By Mr. Fruit): Did you have any later conversation with Mr. Grady? A. I did.

Q. When was that?

A. Well, I had several conversations in the aggregate concerning this, January 26, telegram. The next conversation succeeding the one that I have just discussed was either on the 27th or the 28th. I do not recall which of those two dates that conversation took place.

Q. Did you have one conversation or more than one conversation after the initial conversation within the period of January 27 and January 28?

A. I have a recollection specifically of only one; there may [1488] have been more, more; I just do not recall more than one.

Q. Well, tell the Court the substance of the later conversation you had with Mr. Grady, if you recall, using your notes to refresh your recollection.

A. On January 27 or 28 I advised Mr. Grady substantially——

Mr. Dinkelspiel. What notes are you looking at, Mr. Allmendinger? Just so we know.

(Counsel examining notes.)

(Testimony of Werner Allmendinger.)

Mr. Dinkelspiel: These longer notes start with 1-28, don't they?

Mr. Fruit: Yes.

Q. (By Mr. Fruit): Mr. Allmendinger, before you answer that, those are the same notes that you used at the time your deposition was taken by Mr. Allmendinger?

The Witness: By Mr. Dinkelspiel?

Mr. Fruit: By Mr. Dinkelspiel, I beg your pardon.

The Witness: They are, yes.

Q. (By Mr. Fruit): And they were shown to him at that time, were they not?

A. That is correct, and he also had them previous to the deposition.

Mr. Dinkelspiel: What are you proving by that? That he didn't make up two sets of notes?

Mr. Fruit: No——

Mr. Dinkelspiel: No charge to that effect, [1489] yet.

Q. (By Mr. Fruit): Will you tell the Court the substance of the later conversation on January 27 or January 28, 1948, to which you have just referred?

A. The notes I made concerning that conversation are in considerable detail. In substance——

Mr. Dinkelspiel: Could we, just for the purpose of clarification, and not to delay matters, have the witness testify whether this is a second conversation with Mr. Grady, and the date of it, if he can recall. His notes show it to be dated 1-28.

(Testimony of Werner Allmendinger.)

Now, his first conversation was 1-27.

Mr. Fruit: Well, he has testified, Mr. Dinkelspiel, that this is a later conversation after the one to which he has testified earlier in his first conversation on January 27, and that this took place on the 27th or the 28th, he is not certain on which date it did take place, on one of those two days.

Mr. Dinkelspiel: Well, his notes were made contemporaneously. May I question him further on his notes, your Honor or Counsel?

Q. (By Mr. Fruit): Were these notes made at the time of this conversation to which you are now testifying?

A. The notes that I have now in front of me were made on the 28th of January, 1948, subsequent to a conversation which was held on that day, or the previous day.

Mr. Dinkelspiel: That is all right. [1490]

Q. (By Mr. Fruit): Now, will you proceed to tell the Court the substance of that conversation?

A. Well, in that conversation I advised Mr. Grady that the proposal, referring to the January 26 nightletter was made after considering the whole deal.

I further advised him in respect to the procedure for considering a counter-offer or qualification. I advised him that I didn't know how long it would take to get such a matter considered, and I didn't know how far we would go in modifying. I had told him that we were now in a position that if he agreed to the proposal made, he, being Rosenberg, that, that

(Testimony of Werner Allmendinger.)

we could issue shipping instructions for an unspecified quantity. I told him further that if he made a counter-offer or a qualification, it would have to go to Washington for review, and if they approved such a qualification or counter-offer immediately, we could still give shipping instructions to Rosenbergs; but if it wasn't approved, that we would have to give shipping instructions to someone else.

I told him further that it was my advice that it was going to be extremely difficult for Washington to approve anything that was in a nature of a qualification, first, because it takes time to take action in Washington, and secondly, it was my understanding that they were not sympathetic to modification.

I further advised him in respect to shipping instructions, if he accepted the proposal immediately, we could get shipped [1491] the amount specified.

Then I told him how soon the remainder on the contracts would be ordered out. I didn't know for certain, but we were checking to ascertain whether we would get any advance information on that matter, and that we would let him know if we were permitted to do so.

Then I told him further that CCC—Commodity Credit Corporation—was not going to agree to anything that in any way involved recognizing that Rosenberg had any claim against CCC.

Mr. Dinkelspiel: I notice you changed the word packers where it appears in plural each time.

The Witness: If I may answer that, I haven't read this word for word, I just used this——

(Testimony of Werner Allmendinger.)

Mr. Dinkelspiel: I guess I should wait for cross-examination.

The Witness: I will be glad to give it word for word.

Q. (By Mr. Fruit): That is all on that point, Mr. Allmendinger.

That is your best recollection of your conversation with Mr. Grady at that time, is it not?

A. That is correct.

Q. And you have relied upon the notes to which you have testified, to refresh your recollection, have you not? A. I have. [1492]

The Court: Could I see the telegram of January 26, please?

Q. (By Mr. Fruit): Mr. Allmendinger, I hand you Plaintiff's Exhibit No. 33, which is a copy of a wire from Rosenberg Bros. & Co., to you, dated January 28, 1948, and reading:

"Retel, January 26. This confirms our agreement to extend period for shipment as outlined your wire. Will appreciate receiving prompt shipping instructions."

Do you recall receiving that wire?

A. Yes, that wire was received.

The Court: May I see it? What is the date?

Mr. Fruit: I beg your pardon, January 28.

Q. (By Mr. Fruit): Mr. Allmendinger, I similarly hand you Plaintiff's Exhibit 35, which is a copy of a wire from Rosenberg Bros. & Co., to you, also dated January 28, 1948, reading:

"Supplementing our today's wire we are agree-

(Testimony of Werner Allmendinger.)

able to conditions your wire for packing 12,000,000 pounds raisins in export containers at price increases of $0.0005 a pound. Also it is our intention to deliver raisins under Contract A6PM(ff)1893."

Do you recall receiving that wire?

A. Yes, that wire was received.

Q. Do you recall having a telephone conversation with Mr. Grady about either or both of those [1493] wires?

A. Well, I had a conversation with Mr. Grady on the 29th of January subsequent to the receipt of both of the wires.

The Court: Subsequent to the receipt of both of what?

The Witness: The two wires dated the 28th.

Q. (By Mr. Fruit): Did you make notes of your conversation on January 29 with Mr. Grady?

A. Yes, I did.

Q. Do you recall whether you called him or he called you?

A. Well, my recollection of that particular situation is that I called Rosenbergs to talk to Mr. Grady, that he was not available at the time I called, and that I talked to Mr. Oppenheimer, and that subsequently I talked to Mr. Grady.

Now, whether after talking to Mr. Oppenheimer, I called Grady back later on, or Mr. Grady called me, I don't recall, but I do recall I did talk to Mr. Grady on that date.

Q. Did you testify that you had notes of your

(Testimony of Werner Allmendinger.)

conversation with Mr. Grady made at the time or immediately after the conversation?

A. I have notes of the conversation which were made on the day of the conversation.

Q. Will you please tell the Court your recollection of that conversation with Mr. Grady?

A. I told Mr. Grady it was possible to construe the first wire as not agreeing completely to ship.

The Court: Will you go slowly, please? Now, when you [1494] say the first wire, you refer to the wire of January 26?

The Witness: Now, his first reply to that.

The Court: You see, you have a series of wires. Now, when you say the first wire you indicate to me the wire referred to; please? Marked Exhibit——

The Witness: Thirty-three, your Honor.

The Court: All right. Pardon me, go right ahead.

The Witness (Continuing): ——I told Mr. Grady it was possible to construe that first wire received from him as not agreeing completely to ship and waive carrying charges on contract 1647 if the delivery notices were issued. That is, he was agreeing only in part.

I told him further that it would not be possible to so construe it: if a wire was sent stating that if delivery notice is issued against fruit covered by 1647, Rosenberg agreed to ship such fruit and waive carrying charges, provided our telegram of January 26, Mr. Grady stated at that time that he would

(Testimony of Werner Allmendinger.)

send a wire containing substantially that language.

Q. (By Mr. Fruit): Mr. Allmendinger, I hand you Plaintiff's Exhibit No. 36, a copy of a wire from Rosenberg Bros. & Co., D. K. Grady, to you, dated January 29,

"Pursuant our wires 28, the reference, contract A6PM(ff)1647, we confirm conversation. If delivery notice is issued against fruit covered by this contract, we agree to ship such fruit and waive [1495] carrying charges as provided your wire, January 26." And I ask you if you recall receiving that wire?

A. Yes, that appears to be the wire we [1495-A] received.

Q. Will you please tell the Court what you did after receiving that wire?

A. I advised our Washington office that we had from Rosenberg an acceptance of the proposal outlined, and I believe I quoted them the wires. I believe I further advised the Shipping and Storage Branch in San Francisco that they could now issue shipping instructions to Rosenberg against those two contracts because they had accepted the proposal we had made to them.

Q. Well, how did you advise the Shipping and Storage office in San Francisco?

A. I advised them by telephone, and I confirmed it in writing, I think on the same day.

Mr. Fruit: That is all at this time.

I might want to recall the witness for some other matters later.

(Testimony of Werner Allmendinger.)

The Court: We might take a short recess.

(Recess.)

Cross-Examination

By Mr. Dinkelspiel:

Q. Mr. Allmendinger, this wire that counsel has read to you and which you sent, Plaintiff's Exhibit No. 32, may I ask you this general question. Did you intend by this wire to get Rosenberg Bros. & Co., to waive any claim it might have had—any claim it might have against the government? [1496]

* * *

A. Well, the answer is no, I had no specific intent. I may explain that by saying that the wire was not prepared by me, the wire was prepared by other persons in the Department. I sent the wire upon instructions, and I was not aware at the time the wire was sent of its specific relationship in respect to the question—or its specific significance in respect to the question that counsel has just given to me.

Q. (By Mr. Dinkelspiel): And by the same token, Mr. Allmendinger, when Mr. Grady told you at the meeting of January 27th that he didn't——

Mr. Fruit: I object to that. There is no evidence in the record of a meeting on January 27th.

Q. (By Mr. Dinkelspiel, continuing): ——at the telephone conversation of January 27th that he did not wish to do anything that would prejudice his rights, didn't you tell him that you had no authority one way or another in that matter? [1498]

(Testimony of Werner Allmendinger.)

A. Well, I——

Q. Yes or no in answer, please.

A. Well, the way you have stated that question doesn't correspond to the situation.

Q. Go ahead, have your way. Tell us about it.

A. May I have the question read?

(Question read by reporter.)

A. Well, in connection with that first, I have not stated that Mr. Grady told me what counsel has just stated.

Q. (By Mr. Dinkelspiel): Well, Mr. Allmendinger, didn't you just testify that Mr. Grady at the very first telephone conversation told you that he had been in conversation with Secretary of Agriculture Anderson and he had asserted certain rights there, and he didn't want to take any position now that was antagonistic to that?

A. Mr. Grady advised me of a telephone conversation that he had had with Secretary Anderson which I have testified to, and then Mr. Grady brought up the point of responding to our wire by a qualification using language substantially as "without prejudice to our rights" or similar language in respect to his conversation with the Secretary.

Q. And didn't you tell him that you didn't have any authority with respect to that matter?

A. I have no recollection of making any response to that point he raised at that time. I have

(Testimony of Werner Allmendinger.)

testified that subsequently I [1499] gave him our reaction to responding by a qualification.

Q. Did you tell him at any time that you did not have any authority on the question of adjusting his so-called rights?

A. Well, in that connection——

Q. Yes or no, please, Mr. Allmendinger, and then explain. If you don't understand the question it can be read to you.

A. May I have the question read?

(Question read by reporter.)

A. I do not recall telling him that specifically. I do recall that subsequently I told him that if he responded by a qualification that I would have to refer his response to Washington.

Q. Were you intending to convey to him by that statement that you did not have any authority in the matter, yes or no, please?

A. Not necessarily

Q. Explain your answer.

A. The explanation of that answer would be what I have stated previously, that I advised Mr. Grady that if he responded by a qualification that I would refer it to Washington. What action would subsequently be taken by me would have depended upon the instructions that I received. [1500]

* * *

Q. (By Mr. Dinkelspiel): Did you have any authority in the matter of settlement of any of Mr. Grady's or any of the other packers' claims?

(Testimony of Werner Allmendinger.)

A. I did not consider that I had authority to settle a claim.

Q. Did you or didn't you? Never mind what you considered.

Mr. Fruit: This is in answer to the question of his understanding of his authority at that time. That is about as far as the witness can be expected to go.

Mr. Dinkelspiel: That is as far as this witness will ever go. I know that from previous experience.

Q. Go ahead; you did not understand that you had any such authority, is that your answer?

A. Any authority to settle claims, that's right.

Q. You did not so understand?

A. That is correct.

Q. Have you at any time had any reason to change your understanding in the matter? [1501]

A. No, I have had no reason to change my understanding of the matter.

Q. To the best of your belief is your understanding correct? A. Yes.

Q. Thank you very much. Mr. Allmendinger, would you refer, please, to your notes which are dated 1/28? What is the heading of those notes?

A. The heading reads as follows:

It has my signature initials, the date, 1/28, then the words "substance of information given to raisin packers asking for information on delinquent contracts."

Q. So this was a memorandum, was it not, not only of a conversation with Mr. Grady as you testi-

(Testimony of Werner Allmendinger.)

fied to on direct examination, but with other packers as well? A. Yes.

Q. Is there, anywhere in this memorandum, a reference to Rosenberg Bros. or Grady by name?

A. I don't believe there is.

Q. Does this accurately reflect the conversations you had with other growers—with other packers as well as with Rosenberg Bros. Co.?

Mr. Fruit: I object.

The Court: Overruled.

A. I do not recall the full content of my conversations with other packers on this matter. [1502]

Q. Well, does it reflect—these are your notes. Does it reflect your recollection at the time, January 28th, of other conversations with packers?

Mr. Fruit: May it be specified when he had the conversations with other packers?

Mr. Dinkelspiel: I don't know, he is testifying.

Mr. Fruit: Just reframe your question.

Mr. Dinkelspiel: I stand on the question, your Honor; ask that it be read.

(Question read by reporter.)

A. It indicates that there were other packers involved in connection with the substance of this information.

Q. Mr. Allmendinger, certainly there can be no mystery about this. Let's just review it for a moment. In answer to your counsel's question, you stated that you had memorandum prepared of con

(Testimony of Werner Allmendinger.)

versations with Mr. Grady prepared about the time the conversations occurred; correct?

A. I believe I stated that on the 28th I made notes of a conversation that I had on that day or the previous day with Mr. Grady.

Q. And then you referred, in response to his question, to this memorandum which starts: "W.A.1-28"; correct? A. That is correct.

Q. And that is under the heading of "substance of info."—which I assume was "information"—"given to raisin packers [1503] asking for info, on delinquent contracts."

Now let me ask you this question. Doesn't that refresh your recollection, if it needs refreshing, that you had conversation on the 28th or the 27th with other packers?

A. I have stated that I had conversations with other packers.

Q. I'm sorry, I thought you were a little uncertain about that. You did have conversations with other packers, did you?

A. On the 27th or 8th?

Q. Yes. A. Yes.

Q. And with respect to the matters which are referred to in your memorandum dated 1-28, is that correct? A. That is correct.

Q. Do you mean to tell his Honor that this memorandum is the information which you gave to all of the packers in the conversations you had with them? A. I didn't state that, sir.

(Testimony of Werner Allmendinger.)

Q. Well, let me ask you the question whether that isn't so, Mr. Allmendinger.

A. I believe I stated previously that in respect——

Q. I am not asking what you said previously, I am asking you now. Let's start afresh.

A. All right.

Q. Whether it is or is not so that this memorandum of 1-28 is your memorandum of conversations you had with all of the [1504] packers.

A. I couldn't state that these notes reflect conversations with all of the packers.

Q. Was there any differentiation between what one packer said to you and what another packer said to you in the previous conversations?

A. There may have been.

Q. They weren't all alike, were they?

A. Their inquiries to me?

Q. Yes.

A. I would judge they were not all alike.

Q. By the way, did you tell each of them the same thing as is set forth in your memorandum of the 28th? A. I cannot recall that I did so.

Q. How do you know you said it to Mr. Grady, sir?

A. That is my best recollection, sir.

Q. And can you tell me where you said it to Mr. Vellas of Guggenhime and Co.?

A. I cannot specifically state that I did, sir.

Q. Can you say whether you said these things to any other packer than Rosenberg Bros. & Co.?

(Testimony of Werner Allmendinger.)

A. I can only state that the substance of this information was given to other packers. I cannot state which ones.

Q. But you are positive with respect to Mr. Grady, and you are uncertain with respect to [1505] others? A. That is correct.

Q. Is it because we are in court with respect to Rosenberg Bros. & Co., that you are more certain with respect to Mr. Grady than with respect to others? A. I wouldn't say that is the case.

Q. Is it because you are testifying in this case that you are more certain with respect to him than you would be as to your conversation with Vellas of Guggenhime and Co.?

A. I wouldn't say that is the case, and they may be in court also.

Q. Do you recollect what you said to Mr. Vellas of Guggenhime and Co., on the 27th or 28th?

A. I don't recall specifically. I have some notes on the conversation.

Q. And is your only recollection what appears on your notes?

A. In respect to my Vellas conversation?

Q. Yes. A. Yes.

Q. Is your only recollection with respect to the Grady conversation what appears in your notes?

A. Generally speaking, yes.

Q. Now, let's refer to these notes for a moment, if you will follow me: "No. 1. Proposal made after considering whole deal." That is the statement you told Mr. Grady, right?

(Testimony of Werner Allmendinger.)

A. The substance of it, yes. [1506]

Q. "Procedure for considering counter offer or qualif."—I guess that is "qualification." Then does that mean that you told Mr. Grady how he would have to proceed if he wanted to make a counter offer or to qualify? A. No.

Q. Does it mean that you told Mr. Vellas that?

A. No.

Q. What does it mean?

A. It means that the heading for what I told him our procedure would be if he qualified or made a counter offer.

Q. And that would be to refer the matter to Washington, is that correct?

A. That is one of the things, yes.

Q. And didn't you tell him at that time that you didn't have any authority?

A. I don't recall telling him that specifically.

Q. Now, the next thing is "but don't know how long will take to get matter considered." Does that relate to qualification as referred to in the previous item?

A. Yes, that refers to if he qualified how long did it take to get the qualification considered.

Q. Now this memorandum, Mr. Allmendinger, of yours—and I ask you in all fairness—doesn't contain any memorandum of what Mr. Grady said to you, does it? [1507] A. No, it does not.

Q. This is a one-way memorandum, isn't it, just what Allmendinger said?

(Testimony of Werner Allmendinger.)

A. The heading indicates what it is, sir. [1507-A]

Q. (By Mr. Dinkelspiel): And it also indicates what you said to all of the packers, isn't that right?

A. I didn't so state.

Q. Well, doesn't it indicate that this is what you said to packers, plural?

A. It states what I said to packers, right, sir.

Q. All right.

Now, do you know whether Mr. Grady in that telephone conversation asked you about, suggesting changes in the proposals set forth in the wire?

A. Could you read that? I am not sure I understood it.

Mr. Dinkelspiel: Withdraw the question and I will reframe it.

Q. (By Mr. Dinkelspiel): Have you now any recollection as to what Mr. Grady said to you?

A. In connection with the conversation——

Q. In connection with the conversation which you had with him on either the 27th or the 28th and which is supposedly reflected in your memorandum of the 28th?

A. I don't recall any specific response as such that Mr. Grady made. I do recall that I got the very definite impression that Mr. Grady was accepting the proposal made in our January 26 telegram.

Q. All right. Now, Mr. Allmendinger, will you refer now to the conversation of 1-27. You notice

(Testimony of Werner Allmendinger.)

the language there [1508] under the heading October 16, and then:

"cover March 1, 133.60, based on 110 or 111."

What does that bring back to your mind now as to what Mr. Grady said to you about what price they had expected to cover at and what they did cover at?

A. Well, that brings back to me the recollection that Mr. Grady made reference to the 110 or 111 dollars being the basis for the bid, or what they expected to have to buy raisins at to come out. As you can see, the notes are not comprehensible——

Q. Well, I am asking your recollection only, Mr. Allmendinger.

A. The word "cover" and the "133.60" brings back to my mind that he advised me that they had either covered or would have to cover at that figure, or approximately that figure.

Q. That they had either covered or would have to cover at that figure of 133.60, right?

A. That's right.

Q. Did you know anything about the raisin market at that time? A. I did know, yes.

Q. Do you know what the grower prices, what the growers were getting for natural raisins on October—January 27, 1948?

A. Well, I don't know precisely; I would say it was in the range of 105 to $115 a ton.

Q. So that would bring that back to your recollection that [1509] Mr. Grady was telling you that

(Testimony of Werner Allmendinger.)

they had covered at 133.60 rather than they would cover at that figure?

A. I can't state which of those, I can't recall which of those.

Q. I am just suggesting, jogging your memory that the knowledge of the market being 105 to $115 would indicate Mr. Grady must have been talking about what had happened before?

A. Well——

Q. Just a matter of your recollection. If you don't recall, I am not trying to put any words in your mouth. A. Do you wish an answer?

Q. What did you say?

A. You still have the question?

Q. Well, just does the fact that the market was as you stated it, and Mr. Grady was talking of a figure much higher, $133.60, refresh your recollection what Mr. Grady had told you was then that they covered at $133.60 rather than they were going to cover?

A. Well, let me put it this way:

It doesn't refresh my recollection of what he said or what these notes mean. If I was endeavoring to reconstruct, which is the more logical thing in the light of the facts, that would be something else.

Q. Now, Mr. Allmendinger, who was P. J. Pingotorfi?

A. He was in charge of the Section in the San Francisco [1510] Department of Agriculture Office that issued shipping instructions.

Q. And the next step after the exchange of tele-

(Testimony of Werner Allmendinger.)

grams was approved was to have shipping instructions issued by Mr. Pingotorfi?

A. A next step, yes.

Q. A next step. Was this telegram, Plaintiff's Exhibit No. 32, forwarded to you from Washington or some other place in San Francisco in form for submission to the packers?

A. That's the wire I sent?

Q. Yes; the wire you sent.

A. A draft of the wire that I sent was forwarded from Washington. Subsequent to its receipt here it was modified in some respects.

Q. Was Mr. Graham, Irwin Graham in your office in San Francisco about this time?

A. He was in the area. Our office was in Berkeley, incidentally, at that time, and I believe he came into the office during his——

Q. Who was he?

A. Mr. Graham at that time was Chief of what I believe was then called the Dried Fruit and Nuts Division, Fruit and Vegetable Branch, in Washington, D. C.

Q. And did he take a part in the preparation of this telegram, in consultation with you and [1511] others?

A. Well, it is my recollection that he took part in reviewing the draft that was sent out from Washington and modifying—I don't recall the extent to which I participated in that draft.

Q. Now, at the time the telegram was sent, I will ask you if you know whether there weren't two

(Testimony of Werner Allmendinger.)

points that might have been involved; one a question as to whether the Government had given shipping instructions. Was that a matter that was under consideration to your knowledge in the preparation of this telegram?

A. I'm sorry. I didn't understand.

Q. Was it a fact that the Government may not previously have given adequate shipping instructions under these contracts, a point that was in mind when this telegram was prepared? If you know?

A. I don't recall anything of that nature.

Q. Your conversation with any of the packers didn't have to do with waiving damages from shipping instructions, for failure to give shipping instructions?

Let me put it this way:

Carrying charges, what are they?

A. I believe the contracts that we had provided certain delivery period, so-called free-delivery period during which the contractor was required to deliver the contracted quantity without carrying charges applying, and then subsequent [1512] to the termination of that so-called free-delivery period, if the merchandise was not ordered out previously, a carrying charge applied.

Q. Carry charge was what?

A. A carrying-charge applied. In other words, if we ordered out after a specified period, then the contractor would be entitled to carrying charges of a specified amount.

(Testimony of Werner Allmendinger.)

Q. And does that account, if you know, for this statement in this wire, Plaintiff's Exhibit 32:

"We should like to know whether you will deliver if you receive other notices to deliver provided that no damages for non-delivery will be sought by Commodity Credit Corporation other than the waiver by you of all carrying charges on raisins covered by the contract."?

A. That was a long question, I wonder if you could read that?

(Question read by the Reporter.)

Mr. Fruit: Your Honor, I would like to state for the record again my objection to this line of questioning, because it seeks this man's personal intention or knowledge of intention of something which was not his personal action, nor even his action in terms of framing, but simply a telegram which he sent under instructions.

The Court: Overruled.

Mr. Dinkelspiel: You understand the question, Mr. Allmendinger? [1513]

The Witness: I believe I do. I was aware at the time that certain packers had defaulted on delivery instructions that were issued. I cannot state the extent to which, of my own knowledge, that that was a factor in connection with this wire, because as I stated previously the preparation of the wire was something that I did not actively participate in.

Q. So didn't you discuss the matter of the Gov-

(Testimony of Werner Allmendinger.)

ernment's waiver of carrying charges with any of the packers?

Mr. Fruit: I suggest that question be restricted to the plaintiff in this case.

The Court: Overruled.

Q. (By Mr. Dinkelspiel): Look at the first—will you refresh your recollection by the very first page of your notes that were not referred to by Counsel. I call your attention to, under the second heading, "To Grady": Item 2, "Charges to be waived," and then the word "forever." Does that refresh your recollection as to the waiver of carrying charges?

A. It does to the extent that it goes back to the first conversation on the 27th where he brought up the point of the wire in saying how long the extension was.

Q. So that you explained to him that the waiver of the carrying charges was a waiver "forever"?

A. I believe I did say that.

Q. Those notes, by the way, that you are referring to, are [1514] they notes of any particular conversion, or is that sort of a summary?

A. Well, it is a combination.

Q. Yes. I mean, if it doesn't purport to be notes of any particular conversation, or does it? I don't know.

A. Well, it indicates two things that I advised Mr. Grady in connection with.

Q. All right. Now, if you know this question

(Testimony of Werner Allmendinger.)

you can answer it; if you don't know it, don't answer it, of course.

Now, isn't it a fact that this wire was sent in order to get the growers—the packers to proceed with deliveries under their contract, and that the Government in the wires was willing, consenting to do that, said it would not claim any damages against them, and on their part ask them to waive carrying charges, which was a material change in the terms of the contract.

Do you know whether or not that is, was the reason for the sending of this telegram?

A. I don't know that that was the full import of it.

Q. You do not know that was the——

A. The full import of it.

Q. That, of course, was obviously——

A. There are other things in the wire, of course.

Q. Yes, but that, of course, is part of the sending of the telegram. [1515]

Mr. Dinkelspiel: Well, I requested an answer, your Honor. That is all.

If counsel wishes to put in, and I suggest it might be desirable, the transcription of the notes with the witness' testimony, I think it would be helpful to the Court.

Mr. Fruit: I am quite willing to put the original notes and the transcription, too.

Mr. Dinkelspiel: I don't question the transcription is accurate; I don't claim it is not.

Mr. Fruit: There is one word——

(Counsel talking together, inaudible to the Reporter.)

Mr. Fruit: May these be marked?

The Court: They may be marked.

Mr. Fruit: In evidence?

The Court: In evidence.

The Clerk: Defendant's Exhibit U in [1516] evidence.

* * *

STIPULATION

Mr. Fruit: The parties have agreed upon two stipulations with respect to certain documents and certain facts.

You will recall, at the original phase of the hearing of the trial of this case, there was discussion of a stipulation with respect to notices to deliver and letters in lieu of notices to deliver. We have worked out a basis for that stipulation and would like to stipulate on the record, that is, to offer the documents in evidence and to stipulate on the record with respect to them if we may.

I would first like to have marked for identification as one exhibit photostatic copy of two notices of delivery, or two notices to deliver under the first contract, No. 1647. The first notice to deliver is dated Oct. 10, 1947, and the second notice to deliver is a correction of that notice to deliver, correction being dated Oct. 16, 1947.

Mr. Dinkelspiel: Are those offered now, or offered for identification only?

Mr. Fruit: They have been marked for identification, and they are offered in evidence.

The Court: They may be marked.

The Clerk: Defendant's Exhibit V in evidence.

(Thereupon the documents above referred to were received in evidence and marked Defendant's [1520] Exhibit V.)

Mr. Fruit: Following these notices to deliver it is in evidence that there was the refusal of delivery by Rosenberg through the letter in October, 1947, signed by its employee Laflin.

The Court: What is the date of this?

Mr. Fruit: It was in October, 1947, October 21, 1947, and the exhibit number is Plaintiff's Exhibit No. 20.

Following that, therefore, there were a series of letters to Rosenberg Bros. & Co., from the chief of the Department of Agriculture, San Francisco field office of its Shipping and Storage Branch, Mr. Philip J. Pingotorfi.

The letters were dated November 6, 1947, covering 1,002,000 pounds of raisins; November 10, 1947, covering 987,000 pounds of raisins; November 14, 1947, covering 846,000 pounds of raisins; November 19, 1947, covering 1,974,000 pounds of raisins; November 24, 1947, covering 2,116,500 pounds of raisins; November 28, 1947, covering 2,749,500 pounds of raisins; and December 3, 1947, covering 1,761,000 pounds of raisins.

Those, incidentally, are listed in that way in the January 26, 1948, telegram from Mr. Allmendinger

to Rosenberg. The letters may be referred to as letters in lieu of notices to deliver.

The parties wish to make certain stipulations on the [1521] record with respect to them, that is, to the identified letters.

First, that the forms for these letters were prepared in Washington in advance of the actual telephone conversations referred to in the letters with the blanks in the forms being filled in after the telephone conversations, but at the times indicated in the letters.

2. The forms were used not only with Rosenberg, but were devised for use generally in connection with similar situations in the 1947, 1948 dried fruit purchase programs. The form in each case was used after a failure to deliver had occurred upon a prior or prior shipping notices and was used to avoid the needless issuance of shipping instructions and the expense of shipping and storage arrangements, and to record the shipping default under the contract.

Finally, no question is raised as to the authority of the persons named in the documents for the receipt of the letters or the return of the signed copies of them as stated in the letters. I ask that they be marked and admitted in evidence.

Mr. Dinkelspiel: One second, counsel.

Mr. Fruit: May I state also for the record, in response to a question just now raised by Mr. Dinkelspiel that the only notices to deliver in this case—the only prior notices to deliver in this case were those which have been admitted in evidence as defendant's Exhibit V. That is, those were the only

notices to deliver issued prior to the letters which have [1522] just been offered in evidence.

Mr. Dinkelspiel: That is satisfactory, counsel.

The Court: They may be marked.

The Clerk: Defendant's Exhibit W in [1523] evidence.

* * *

Mr. Fruit: It is stipulated by the parties that the defendant paid the plaintiff the prices specified in the two contracts here in suit A-6-PM(ff)—1647 and A-6-PM(ff)—1893 for the quantities of raisins delivered under said contracts, the payments having been made at the prices specified in the contracts as amended, and upon vouchers identical to the one herewith in evidence as Defendant's Exhibit Y, except for these changes in the typed portions of the vouchers to reflect differences in the dates, amounts, and other details of the particular shipments covered by the vouchers.

The vouchers were those customarily required to be signed as a condition precedent to receiving payment from Commodity Credit Corporation. The plaintiff does not hereby make any stipulation or concession as to the legal effect of said payments, either as an accord in satisfaction, waiver, or otherwise.

Mr. Dinkelspiel: You said that the payments as provided by the contract. Don't you want to include as amended by the telegram that Mr. Allmendinger had sent?

Mr. Fruit: The reference to the contract as

amended refers to the amendment effective pursuant to the January 26, [1524] 1948 telegram from Mr. Allmendinger to Rosenberg.

Mr. Dinkelspiel: Relating to canning charges.

Mr. Fruit: Plaintiff's Exhibit No. 32.

Mr. Dinkelspiel: I think that is sufficient in the stipulation. I want to emphasize the condition precedent that counsel and I are agreed that many of these vouchers, in fact if not all of them, were signed in advance of payment which is the usual government custom. The words "condition precedent" will probably protect us on that. [1525]

* * *

The Court: We have Mr. Smith, who admittedly is a man well qualified who, after a careful study of the situation, came unalterably to one view, and that was that those contracts in question before the Court, as well as other contracts of comparable character should have been renegotiated.

Mr. Fruit: Yes, but that was on his view of what would have been in the best interests of the program they had started out to accomplish. I don't question his judgment on that.

The Court: What was the avowed purpose of the Commodity Credit Corporation in undertaking this program in the Valley, to benefit the Department of Agriculture in adhering to a low price?

Mr. Fruit: Oh, well, of course not, sir.

The Court: Secretary Anderson seems to think so.

Mr. Fruit: No, no, your Honor, seriously and sincerely——

The Court: The record would seem to bear that out.

Mr. Fruit: No, he has testified and there has been no [1550] controversies that his purpose was to benefit the Valley, but——

The Court: He said this, counsel——

Mr. Fruit: That purpose was frustrated.

The Court: He said this. He said he could not cancel a contract when the price to the Government was such that it would result in a loss to the Government if he cancelled that Government. Did he not say that?

Mr. Fruit: When there would be no advantage to the Government. [1551]

* * *

DWIGHT GRADY

having been previously sworn, called on behalf of the plaintiff in rebuttal.

Direct Examination

By Mr. Dinkelspiel:

Q. Will you please restate your name for the record? A. Dwight G. Grady.

Q. I believe we have seen you there before, Mr. Grady? A. Yes, that is correct.

Q. Mr. Grady, I mentioned to the Court and to counsel that I would ask you to explain the circumstances, if you recall, of this letter, Defendant's Ex-

(Testimony of Dwight Grady.)

hibit AH dated October 8, 1947, to Mr. Milton G. Cooper, just so it doesn't stand suspended in the record.

A. Mr. Milton G. Cooper was a producer of raisins whose custom Rosenberg Bros. & Co. usually enjoyed, and my only memory of this particular letter is what the letter itself contains.

Q. Well, don't restate the letter.

A. I don't intend to. It simply reminds me that Mr. Cooper wrote a letter to Mr. Setrakian in which he referred to an address I had made to a regional meeting of the National [1652] American Wholesale Grocers Association in San Francisco in June.

At that time we were facing a situation following a very sharp decline in prices of 1946 crop raisins from a very high level in the summer of 1946 to a relatively low level, more than a 50 per cent drop in raisin prices and my address to the National American Wholesale Grocers Association was to the effect that in relationship to other commodities dried fruits generally were a bargain, that they were a fine staple food, and so forth.

All the things that you would try to do in a public relations effort to improve the confidence of buyers generally in commodities you handle. In addition to that I pointed out, as the letter states, that the trade was slow in accepting such arguments, and that its confidence seems to have been shaken by the way the government was operating its program in this field. [1653]

* * *

Q. By the way, while we are on that subject, you

(Testimony of Dwight Grady.)

have probably heard me complaining that the so-called bible didn't always reflect accurate entries. Was there a difference in purchase and sales, to your knowledge, if you know, between the actual delivered weights in purchases and the purchase as shown in that bible?

A. Oh, yes, there was always a difference. The bible showed contracted tonnages. That is to say, tonnages reflecting the grower's estimate before delivery of what he expected to produce and to deliver, and later when the actual deliveries were made, those deliveries never accurately fitted the earlier estimate.

Q. Were they up or down or either?

A. They were both ways. There were always variations, either more or less. [1657]

* * *

Q. (By Mr. Dinkelspiel): I will ask you, Mr. Grady, whether or not your company was or was not actively in the market between September 16 and October 17, 1947? A. It was actively——.

Mr. Fruit: Same objection.

The Court: Overruled.

The Witness: It was actively in the market in the sense that it was trying to buy raisins and to keep in touch with the market throughout the entire period of the harvesting season. It regulated its operations insofar as instructions were concerned based upon the conditions reported to it by [1660] its Fresno office.

(Testimony of Dwight Grady.)

Q. Now, Mr. Grady, Mr. S. R. Smith testified the other day that in his opinion the packers could have gone out and covered the September and October bids by options. Senator Anderson testified to the same effect. Will you state to the Court when in that year, if at all, options were used?

A. Options were not used—reference to secure options by some packers——

Mr. Fruit: I object to the question and any further answer on it because it is not limited to the practices of Rosenberg. It is not shown that the witness has any knowledge with respect to even the practices of Rosenberg but certainly the practices of any other packer——

Mr. Dinkelspiel: You weren't here the first three days of trial, and you apparently haven't read the testimony very accurate if you question this witness' knowledge of Rosenberg's activities, or his knowledge of the industry.

I stand on the question, your Honor.

The Court: You may answer.

The Witness: Would you mind reading the question?

(Question read by reporter.)

A. Options were used or efforts to secure options were made following the fixing of a price by Commodity Credit Corporation of $135 to be paid by a producer. In the normal course of business options are never secured by packers in their [1661] transactions with growers. In that sense packers attempt

(Testimony of Dwight Grady.)

to either buy outright at a price, or if the growers decline to take those prices, to secure raisins on open contracts.

Q. You are acquainted, are you, with a gentleman named Arnold? A. Yes, sir.

Q. By the way, to your knowledge, when did he first become a vice president of Rosenberg Bros. & Co.?

A. In late November or early December, 1947.

Q. You are positive of that date?

A. Yes, because he was given the promotion at that time by Mr. Oppenheimer at the same time he promoted me in order to help our position, as he stated it, in connection with the new buyer, Mr. Cummings.

Q. Well, this ex-vice president, Mr. Arnold, stated the other day in answer to the following question:

"I would ask the witness, if he knows, to tell the Court whether prior to September 1, 1947, Rosenberg had adopted a selling policy in anticipation of its 1947 raisin crop operations.

"The Witness: Yes.

"Counsel: What policy had been adopted?

"Answer: Along in the summer we concluded that it would be advisable not to support the raisin market and to try to get as much business [1662] as we could, if necessary, to sell short."

Were you aware of all policies fixed by Rosenberg Bros. in the summer and fall of 1947 insofar as the raisin market was concerned?

(Testimony of Dwight Grady.)

A. Yes, I was.

Q. Will you state whether or not Rosenberg Bros. & Co., concluded in the summer that it would be advisable not to support the raisin market?

A. That was not true as of the dates referred to, or any other date.

Q. And the date referred to by the witness was along in June or July of 1947 before the start of the active trading season? A. That is correct.

Q. And there was no such policy determined at that time?

A. No, sir, there was great curiosity as to what the government might finally do with this huge crop that was promised. [1663]

* * *

Mr. Dinkelspiel: Counsel, your objection is well taken. I didn't mean to mislead the witness. We are now talking about the period of September and October, 1947. If there was any misunderstanding about that, you have my apology, counsel.

"If you know, did Rosenberg use open price contracts in this period?"

I am now talking about September and October, '47.

" * * * or did it not?"

The answer of Mr. Arnold was:

"Yes, it did.

"Question: For the purpose of forcing the market down?

"Answer: I would say that the effect of the

(Testimony of Dwight Grady.)

open price contracts generally was to drive the price down and there was a definite benefit in having merchandise in the open market price contracts if you were taking a short position."

Now I will ask you, Mr. Grady, whether to your knowledge Rosenberg Bros. did or did not in September and October of 1947 or either of those two months use open price contracts for the purpose of forcing the market down? A. It did not.

Q. Will you explain?

A. Rosenberg Bros., as I have previously testified, was [1664] attempting to buy raisins. It had prices at which it was willing to buy raisins. When growers refused to accept those prices its only other means of securing raisins was to take them on open price contracts. [1665]

* * *

Q. Mr. Grady, in the course of the experience which the company you managed had with open price contracts, did you yourself acquire a certain amount of experience?

A. Yes, it was my responsibility to determine policies with respect to contracts and the execution of specific contracts. However, I did not personally sign contract of purchase because we had a field staff and a buying department that did those things.

Q. But are you personally familiar with the use of these contracts as a buying medium by the company you served? A. Yes, of course.

(Testimony of Dwight Grady.)

Q. And of the purposes sought to be accomplished by the use of open price contracts?

A. That is correct.

Q. Will you state to his Honor, please, what these purposes are?

A. Well, the purposes basically are to acquire raisins. In [1666] any normal set of circumstances, and even in an abnormal circumstance, there is always a price—this is a commodity that is on a cash basis. Sometimes the prices are not satisfactory to the seller. Under those circumstances he has actually three options. He can either sell at the firm price, he can sell on an open contract, or he can decline to sell at all and that is his privilege and that is the way it works.

Now, under certain conditions, and this is one of the inducements for growers to sell on an open contract, he makes money by deferring pricing his contracts. Sometimes he does no better, and sometimes he loses. Those are the normal risks that are inherent in pricing any commodity.

Q. So that an open contract would not necessarily have either a depressing or a buoyant effect upon the market?

A. That is correct. Other conditions completely aside and apart from the form of contract determine those situations.

Q. Now, if you don't mind skipping with me and going to one bit of testimony of Mr. S. R. Smith at page 1236 of the transcript, Mr. Fruit asked Mr. Smith the following question:

(Testimony of Dwight Grady.)

"Mr. Smith, between September 5, 1947, and October 15, 1947, did Mr. Dwight Grady ever ask you if the government or the Commodity Credit Corporation would buy more than 61,000 tons of raisins in the 1947 crop year?

"Answer: I have no recollection of Mr. [1667] Grady asking me such a question.

"Question: Did anyone else connected with Rosenberg Bros. & Co., ask you that question?

"Answer: I have no recollection of any such question.

"Question: Did anyone not connected with Rosenberg Bros. & Co., Inc., but in the raisin industry ask you that question?"

My objection was sustained by his Honor and Mr. Fruit continued:

"Mr. Fruit: Your Honor, if I may briefly ask for reconsideration of that ruling for this reason"——

and there is further argument, and then Mr. Fruit concludes:

"Now, the question I have asked would tend to prove that Mr. Smith did tell Mr. Kluge that the government might conceivably buy more dried fruits, not necessarily raisins, but dried fruits than the quantities announced in the press release announcement.

"The Court: You may answer, Mr. Smith.

"Answer: I recall receiving a telephone call from Mr. Kluge, and among the questions that he asked me was whether I had any information or

(Testimony of Dwight Grady.)

could give him any idea of whether the Department would confine its purchases to those specified in the press [1668] release issued by the Secretary from Albuquerque, New Mexico.

"My reply was that I was in no position to tell him or anybody else whether or not the Commodity Credit Corporation would buy more than the quantities stated in that press release."

Now I will ask you the question whether Mr. Kluge conveyed to you that statement of Mr. S. R. Smith?

A. No, Mr. Kluge told me that he could get no information out of Washington except that Sy, meaning Mr. Smith, had said the packers better get together and "cut bait."

Q. And that was before you suggested to Mr. Smith this Webb-Pomerene procedure?

A. That prompted me to send the wire to Mr. Smith suggesting a legal way in which the packers could get together and "cut bait."

Q. And in short, you received no information from Mr. Kluge to the effect that you shouldn't rely on the government's indication it would buy only 61,000 tons?

A. No, Mr. Kluge is in the prune business.

Q. And not in the raisin business?

A. Not in the raisin business.

Q. Skipping now to the testimony of Senator Anderson—and we will concede for the record that a very considerable difference between your recollection and Senator Anderson's [1669] recollection of

(Testimony of Dwight Grady.)

what transpired at a certain conference at any rate. We will not burden the Court with repeated denials, but I want to ask you first a very general question. I am showing you Plaintiff's Exhibit No. 21 which you have testified to is a telegram of quite some considerable length dated October 31, 1947, which was sent to Hon. Clinton P. Anderson.

Now, I want to ask you when you had your conference with Senator Anderson on November 19, 1947, did Senator Anderson to your knowledge have that telegram physically in front of him or with him?

Mr. Fruit: I object to that. It calls for his knowledge. If you will ask the question of the witness did he see it——

Q. (By Mr. Dinkelspiel): Did you see it?

A. No, I didn't——

Q. I will reframe the question as requested. Did you see the telegram?

A. I did not, because it wasn't in sight.

Q. And did Senator Anderson read from any document to you in the course of that conversation purporting to quote what you had said?

A. He did not.

Q. Senator Anderson has testified that with respect to your wire of October 14 that you would release all purchases from growers at less than $140 a ton that you restricted in your conversation with him your offer so to release the growers. [1670]

A. I did not. That was an unqualified offer to re-

(Testimony of Dwight Grady.)

lease all tonnage under contract with growers booked at less than $140 a ton.

Q. When you say "that was a qualified offer"—— A. Unqualified, I said.

Q. And you did not state to Senator Anderson that you were limiting that offer to government tonnage? A. No, sir, I did not.

Q. Or purchases for government tonnage?

A. No, sir, I did not.

Q. As a matter of fact, would it be possible to do that?

A. No, it is obviously impossible. We couldn't select one group of growers and say that their raisins were intended for commercial sales, and another group of growers and say that their raisins were intended for government sales. That is just impossible of operation. It simply couldn't work. We could cancel all contracts with growers below $140 because growers would accept a cancellation from which they were to benefit.

Q. Just one more question with respect to Senator Anderson. The testimony is, both from your previous testimony and Senator Anderson's testimony that he showed you, or his secretary showed you a letter which he was sending on February 8th, 1949, to Mr. Abraham Weinfeld.

A. Yes; that is the correct date. [1671]

Q. Did you see such a letter?

A. I saw this letter in its original draft; I didn't see it after the corrections were made to which Mr. —to which Senator Anderson testified and which I see were made in——

(Testimony of Dwight Grady.)

Q. In this copy which I have shown you. In other words, those corrections that appear in this letter were, in the second paragraph, when he said, "And when I learned," there was inserted "from Mr. Grady," apparently. You didn't see the "from Mr. Grady"? A. No, it wasn't there.

* * *

Q. (By Mr. Dinkelspiel): Mr. Grady, I recall that yesterday, I believe it was, his Honor asked one of us if we could account for the drop in market in the early part of the year.

In your experience and business and your knowledge of the crop year '47-'48, have you any opinion as to what accounted for the rather marked decline in prices in January and February?

A. Yes, there was a complete destruction of trade confidence as well as industry confidence as a result of the frequent [1672] changes in this program. The trade was buying almost not at all, going to what we call hand-to-mouth buying, in very small quantities, and the demand was stifled to a point where no one had confidence in the market.

* * *

Q. (By Mr. Dinkelspiel): Mr. Grady, when did Mr. Oppenheimer die? [1673]

A. Mr. Oppenheimer died on March 3, 1950.

Q. And is it true that prior to his death proceedings had been started before the Contract Disputes Board?

A. Yes, in February of that year we applied for

(Testimony of Dwight Grady.)

a hearing before the Contract Disputes Board of the Commodity Credit Corporation.

Q. And that an application for hearing had been made prior to his death?

A. Yes, an application was sent into Washington and later acknowledged following his death.

Q. I think you have already answered this, but lest there be any doubt, I will reask it. Have you any relationship at the present time, financial or otherwise, with Rosenberg Bros. & Co., plaintiff in this action? A. None whatever.

Q. And you're appearing here under subpoena?

A. Yes, sir, that is correct. [1674]

* * *

ARGUMENT

November 5, 1953, at 10:00 A.M.

The Clerk: Rosenberg Bros. & Co., Inc., versus Commodity Credit Corporation, on trial.

Mr. Fruit: Your Honor will recall that yesterday afternoon you suggested that the record be kept open until today to permit the submission of further exhibits. In view of the frequent references in the record to administrative proceedings upon certain of the questions in this case, and of your Honor's discussion after the hearing yesterday with counsel of those proceedings before the Contract Disputes Board, the Government believes it advisable to offer in evidence the transcript of the hearing before the Contract Disputes Board, a copy of the minutes of

the Contract Disputes Board's determination upon that transcript, which Mr. Ehrlich referred to, you recall, in the colloquy late yesterday afternoon, and the communication, thirdly, of the communication of the Contract Disputes Board decision to Rosenberg. Three documents. We offer them not to prove the pro or con of specific testimony in the case, or of the actual evidence, although for such weight as it may have, the Board's decision in the administrative proceedings will, of course, speak for itself under the circumstances of the law.

Mr. Dinkelspiel: If your Honor please, I don't think that we should throw into the record in this case just a [1679] hodgepodge of everything, irrespective of relevance. I don't see how your Honor can have any legal interest or practical interest in the proceedings before the Contract Disputes Board, a partisan group, coming within the very organization with whom we are fighting now. And if, as the counsel says, not for the purpose of proving what is in the document, but only for the purpose of maybe influencing your Honor somehow because a decision was made in a certain way, then, of course, if your Honor would admit it, it is incumbent upon us to go further.

And I might say to your Honor, just to show where my objection really lies, that I will then offer to your Honor the opinion of the Solicitor of the Department of Agriculture sent to the Contract Disputes Board before the hearing in which he said that Rosenberg Bros. had no claim, and then I will show to your Honor, notwithstanding, they had a

full hearing, and without communicating with Rosenberg Bros. several months later after the hearing communicated with Mr. Allmendinger, got certain of his notes and records, and without giving any further opportunity to Rosenberg Bros., then made its decision, not based upon the Solicitor's recommendation, strangely enough, which was strongly against Rosenberg Bros., but upon a so-called waiver, because we had delivered pursuant to Mr. Allmendinger's demands.

If your Honor thinks that whole story will help in any way [1680] in your Honor's decision in this case, why, maybe I shouldn't make the objection. I can't see it. The whole thing is irrelevant.

The Court: Counsel, if I indicated to you yesterday that I had a desire to review that record, I should correct——

Mr. Fruit: I am not submitting it for the review of the record.

The Court: I should correct your possible misunderstanding you may have. I merely asked a question concerning general procedural technique. I wasn't familiar, frankly, with the technique employed before this particular Board, and I think I know in a general way now what kind of a hearing was obtained.

Mr. Dinkelspiel: In the form of a kangaroo court, your Honor, and we would be paying a high tribute——

Mr. Fruit: In that respect let me counter that statement with the final statement of Mr. Ehrlich as counsel for Rosenberg before the Board, and I will

read it only because of the remark that counsel has made.

"Mr. Ehrlich: Thank you very much for what I consider to be a very courteous and full hearing."

Mr. Dinkelspiel: That was before he knew they were taking testimony behind his back, counsel. He is a polite man; I am not. [1681]

The Court: Do you know, counsel, once there was a lawyer in this court—this is off the record.

(Off-the-record discussion.)

Mr. Fruit: May I say one last comment, on page 4 of the transcript, at the beginning of the hearing:

"As you understand, Mr. Ehrlich"——

this is the Chairman of the Board speaking——

——"the Board will receive from the various files in the Department all information concerning the actions taken by the Government in this case. Those files are not available to you. They will be, of course, considered by the Board in arriving at its conclusion in this case." Now I mentioned while I was——

The Court: Counsel, I am fearful if I received the record, notwithstanding that you may think it may have some persuasive effect, or edifying effect, that it would be reversible error.

Mr. Fruit: Well, let me say this: I am not offering it—frankly, it would not be necessary, in my judgment for you to read it to consider what purpose I had in offering it. The thing I really want to offer—the things I really want to offer are the minutes of the Board determination meeting, and

their final communication, that is, the letter, their final communication to Rosenberg. I am sure that if those were to go in, Rosenberg would want this in. That is the only reason I offer it, because it does set forth the Board's [1682] statement to plaintiff in this proceeding of the scope of the administrative proceedings.

In the PMA-100 form, standard terms and conditions, annexed to the contract in this case, Article 22 is the Standard Disputes Clause contained in most government contracts. I am sure your Honor is familiar with that generally. It reads in this case:

"Any dispute concerning questions of fact which may arise under the contract and which is not disposed of by mutual agreement, shall be decided by the officer executing the contract in behalf of the agency or by a designee of the agency who shall reduce his decision to writing and mail a copy to contractor. Within 30 days from said writing contractor may appeal to the head of Agency, whose decision or that of his designated representative shall be final and conclusive upon the parties. Pending decision of such dispute the contractor shall diligently proceed with the performance of the contract."

Now, the Contract Disputes Board of the Commodity Credit Corporation under——

Mr. Dinkelspiel: May I just interrupt counsel for one moment? He has the disadvantage of not having been here in [1683] the early stages of the trial. I am assured by him he has read the transcript. Does your Honor recall the statement made by Mr.

Wolkinson, been made repeatedly throughout, that it was not essential for plaintiff to have gone before the Contract Disputes Board before bringing action in court here? That has been admitted by the Government from the start.

Mr. Fruit: Well, that is stated in these minutes, in effect, but the fact is that they did go to the Board and the Board did make a decision on the issue.

Mr. Dinkelspiel: And it was also admitted there was no relevancy to the decision by the Contract Disputes Board. Now, can't we end on a note of agreement while arguing about something—incompetent, irrelevant and immaterial——

Mr. Fruit: I will be through in a moment. Under the regulations of the Commodity Credit Corporation, under the Department of Agriculture, as set forth in the Code of Federal Regulations, to which appropriate reference has been made, the Contract Disputes Board of the Commodity Credit Corporation is the appeal agency in matters under the Disputes Clause.

Now, I submit that a proper question for consideration for the Court is whether the decision of the Contract Disputes Board in this case is final on the issue of waiver in this case. Co-counsel suggested that I cite the Code of Federal Regulations on that. It is Title 6, sub-chapter A, [1684] part 400.

The Court: May I regard your statement as an offer in that respect?

Mr. Fruit: Yes, sir.

The Court: The objection is sustained.

Mr. Fruit: May these be marked for identification?

The Court: Yes, sir.

Mr. Fruit: For identification first.

The Court: Mark those documents, Mr. Clerk.

The Clerk: Defendant's Exhibit AL for identification.

(Thereupon the transcript of appeal before the Contract Disputes Board was marked Defendant's Exhibit AL for identification.)

The Court: Will the record now show the matter stands submitted? The evidence?

Mr. Dinkelspiel: Yes.

Mr. Fruit: Yes.

The Clerk: Defendant's Exhibit AM for identification.

(Thereupon the minutes of the Contract Disputes Board were marked Defendant's Exhibit AM for identification.)

Mr. Fruit: May it be noted on the record this one thing in connection with these exhibits? I am sure counsel will be willing—that the plaintiff was furnished, after the hearing before the Contract Disputes Board, with a copy of the [1685] transcript of the hearing.

Mr. Dinkelspiel: Transcript of the hearing?

Mr. Fruit: That is the copy of the transcript which I have had marked for identification.

Mr. Dinkelspiel: We bought it, didn't we?

Mr. Fruit: Mr. Ehrlich is nodding his head in

agreement, is that right, Mr. Ehrlich, that you had received a copy?

Mr. Dinkelspiel: Your Honor please, I object to the question, incompetent, irrelevant and immaterial. I do not care to go any further into this matter of the Contract Disputes Board.

The Court: I think we concluded so far as the legal aspects are concerned.

Mr. Fruit: Yes, sir. All right.

The Court: Whether you received a copy of the transcript is thoroughly immaterial.

The Clerk: Defendant's Exhibit AN for identification.

(Thereupon letter dated August 21, 1950, to Mr. Ehrlich was marked Defendant's Exhibit AN for identification.)

Mr. Dinkelspiel: Your case submitted, counsel?

Mr. Fruit: Yes. [1686]

* * *

Mr. Dinkelspiel: * * * Being informal, I am now going to do something that if it were formal and I were being held strictly to the testimony, I wouldn't do. But I have been so surprised by the various changes of position that the Government has taken ever since they started getting into a dispute about this, to and including three minutes ago, that I am going to read to your Honor from this transcript purely by way of argument. The very beginning—this is the Chairman speaking:

"The proceeding under which we are considering this appeal is under Section 400.1(c)(2) of the Co-

tract Disputes Board, copies of which have been made available to you, Mr. Ehrlich. Under this type of proceeding the claimant is not required to appeal to the Contract Disputes Board to exhaust his administrative remedy before recourse to the courts, so that determination of the Board would not be final in the case unless a settlement is arrived at mutually satisfactory to both parties. If a settlement is not arrived at and the determination of the Fruit and Vegetable Branch is upheld by [1687] the Contract Disputes Board, you are free to exhaust your legal remedies in the courts."

Now, I say here, your Honor, and in all fairness, that I am actually bewildered, I think is the word, by the attempt now on the last day, the last part of the hearing, to produce for any purposes this transcript of the hearing of the proceedings before the Board, or by citation of authority to attempt to suggest to your Honor that there is any weight to be given to such a proceeding which, by its very terms, despite Mr. Ehrlich's politeness, is one sided and where the trier of the fact is also the advocate of the cause. [1688]

* * *

Mr. Dinkelspiel: I do want to correct what I think was an omission in counsel's reference to Mr. Oppenheimer's testimony that the differential was $35 a ton. You may remember he said, "before stemming loss." And I asked him what the stemming loss was, and he said six per cent. So at $110 a ton you add $6, or add 60 cents, your Honor——

Mr. Fruit: Yes, I cited that.

Mr. Dinkelspiel: Well, to $41.60. Now, before this claim—this claim filed with Mr. Smith was intended to and in its tabulation on page 18, showed a total alleged out-of-pocket loss of the Rosenberg firm under the contracts with the Government. It starts out by showing it purchased raisins at $135.24 a ton, and then adds its actual costs of processing these, including a percentage of overhead, which brings it up to $182.76 a ton, which, as you will note, is considerably more than the $40 differential we have been talking about, which is a 45, $46 differential, and on that basis of actual out-of-pocket costs, asked for relief, renegotiation, repricing, relief.

Now, we can't come before the Court, I don't think, and [1772] say that any part of a loss we would have incurred had the Government not reached its contract is recoverable by us as damages. In other words, if that $40 differential was, as in the claim, $46, we can't come before the Court on contract damages on that basis.

Now, here is what we say, and this is the basis of our claim. We are not asking for our out-of-pocket costs reimbursement because we bid too low, and that was in the nature of the adjustment in the claim here in relation to what happened afterwards. We are asking, your Honor, in this court only for the contract damages caused by the breach of the contract. There is undisputed testimony, and the Sunmaid bid supports it, a grower bid, and the market quotations support it, that these bids were based upon $110 per ton, the market was at $110 per ton the day the Government changed its program, and

our loss is the difference between that $110 per ton and whatever we had to pay for raisins which would properly satisfy this contract.

Briefly stated, it doesn't make any difference for the purpose of this proceeding whether our processing cost was $60 a ton, $20 a ton, 30, 35, or 40; all we are asking this Court to determine is the difference between what we would have gotten for raisins—what we would have been able to buy the raisins for had the Government contract not come along, and what we did buy the raisins for. That is a well-recognized [1773] and positive rule of [1774] damages.

* * *

Tuesday, November 23, 1954

* * *

The Court: And on the question of damages, it may be noted that defendant concedes in his brief at page 40 thereof, lines 10-13:

"Admittedly Rosenberg had no raisins to deliver under the contract by October 14 when the Government indicated that it would buy additional raisins, although as a matter of law it could have been compelled to deliver them by that time." [4*]

We therefore have a starting point, as apparently conceded by defendant, that prior to October the 14th, there had been no purchases made, nor could there have been any purchases made, by Rosenberg or any person or corporate body similarly situated, and October the 14th, then, I take it, may

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

be the starting point in any discussions with respect to costs of raisins or the sale thereof either to the civilian trade or to the military trade or to the Commodity Credit Corporation.

Is that a correct observation, counsel?

Mr. Dinkelspiel: I would think so, your Honor.

Mr. Eardley: Well, I think I will reserve my comment until I hear what Mr. Dinkelspiel has to say. [5]

* * *

Mr. Eardley: I agree. I don't believe that it is important because if he is entitled to recover at all he is entitled to recover the difference between what he paid and what he had to pay as a result of the alleged breach. That is an obvious formula. So I think that all of the talk about the spread is quite beside the point insofar as the theory of the damages is concerned. I just wanted to point out that if there is profit involved it doesn't make any difference; he is entitled to it if he is entitled to recover. [32]

* * *

The Court: As I recall the testimony, counsel, Mr. Grady testified categorically that the price of $110 or thereabouts would have been maintained or would have maintained itself in a competitive market had not certain other events intervened. There is no contra evidence. [35]

* * *

The Court: Then your position, in short, is that notwithstanding the prophetic statements made by Mr. Grady who, I take it, is an expert in the field,

he could not on behalf of Rosenberg acquire tonnage at the price basic of $110.

Mr. Eardley: There is absolutely nothing in the record to support it. If you will examine the market reports and read [44] the bulletins you will find that the growers weren't going to deliver at that price. And they didn't—they just didn't. These people were supposed to buy 10,000 tons for delivery starting in October; they bought two or three hundred. That is all they could buy—that is all they could buy. [45]

* * *

The Court: Up to this point, so we can summarize, you attack the premise, the very premises upon which Exhibit 45 finds a predicate, to wit, that at no time within the periods mentioned could Rosenberg acquire or purchase raisins in the open market at $110 a ton.

Mr. Eardley: I argue that; I argue, too, that the price [46] which they say is paid is not the price they paid, because they didn't buy the raisins in that period, as their own statements show. [47]

* * *

My theory is that if the Court were to conclude that it must find for the plaintiff and that it is going to arrive at a formula that it should accept the formula that the—now, this is related to one figure only—that the raisins which were furnished to the Government were the cheapest raisins which they bought. [48]

* * *

The Court: It was described to the Secretary that at one time he said that the processors have been trying to gouge the people, and that's the reason he wouldn't renegotiate. Counsel, if ever a case presented itself for renegotiation, this case did. And during the course of the trial, and you did not have the benefit of reviewing the testimony of your economist, he took the stand before this court and stated he advocated renegotiation.

Mr. Eardley: I have read the record, sir.

The Court: Unqualifiedly.

Mr. Eardley: I have read the record.

The Court: And I was very much impressed with his forthright testimony. Of course, the fact that a case may warrant renegotiation, or a situation may warrant renegotiation, doesn't perforce create a liability under a contract. I realize that. [53] But you must, in the very nature of things, admit that there was a background of rather extreme equitable consideration not only to this processor but to processors similarly situated. I would say that any fair examination of the record would be inevitably to that conclusion. [54]

* * *

Also you might have in mind tomorrow discussing that which is left in the realm of inference and argument which is voiced today by you in argument that Rosenberg did not decide to comply with the obligation embraced in the several commitments until a late date in January. At that time it is alleged or asserted the market broke and Mr. Grady

said, well, we'd better deliver at that price, and the delivery was made after negotiations currently made with one of your field men.

Now, you contend that Rosenberg picked up the commodity, or the raisins, subsequent to January?

Mr. Eardley: No, sir, I couldn't possibly contend that.

The Court: All right.

Mr. Eardley: No, sir, it is out of the [55] question.

* * *

The Court: Well, at least we have met certain lines of demarcation now. We know from our discussion today that it is not your contention that the government acquired the raisins in question after the break in the market. [58]

* * *

Wednesday, November 24, 1954, 2:00 P.M.

* * *

As I explained yesterday, and I won't go into any length, but in glancing through the market—they call it the Federal-State News Service—for the month of September and the month of October, I think it can only be concluded that Rosenberg Bros. would never have been able to have fulfilled the contract which they undertook to start delivery on October 1 at the price they wanted to pay, $110. They endeavored, as I point out again, if you will refer to Mr. Foley's deposition, their buyer in Fresno, he had instructions to buy at 110, at 115

and $120 in considerable quantities, and he was not able to buy but two or three hundred tons in over a month's time. [61]

* * *

The Court: Wherein with reference either to correspondence [76] or oral statements does it appear either by expression or by implication that Rosenberg acting through its agents and servants undertook to waive any claim for damages for any breach?

Mr. Eardley: I am not able to point to anything in the record in which the Government or Rosenberg made any definite commitment about the breach. However, I would like to call your Honor's attention to the facts which the Government upon which the Government bases its argument that there was a waiver. [77]

* * *

The Court: I find that within the contemplation of the legal structure of the CCC that they have the right to compromise and negotiate the compromise of claims. What could have been in the mind of the solicitor? Here we have the Government, acting through Senator Anderson, indicating that they would not cancel the contracts in question, because, according to Secretary Anderson, they were most favorable, the price was extremely favorable to the Government and that apparently they looked upon the situation in a proprietary function rather than a governmental function. If they were looking at the over all picture and the benefits that might flow to the people in the Valley, it seems to me they would have

promptly released Rosenberg and others similarly situated and undertaken to call for new bids, in the light of a market which appeared to be sustained to the point of $135 a ton.

I believe, counsel, the logic is inescapable, that an inequitable situation followed. These processors could not, under any bargaining arrangement that I can perceive, they could not purchase the raisins in question in the light of the revised program of the CCC. [89]

* * *

Mr. Eardley: Well, yes, I will comment on that, if you wish, particularly with respect to the equity which is obviously troubling the Court.

The record indicates, and I have pointed out very many times, that the plaintiff could not, before October 14, have purchased at $110 a ton. Mr. Arnold testified, if you will remember, that the plaintiff had deliberately underbid the market because of the competition it expected from Sun Maid, which was a cooperative. The plaintiff deliberately entered into a gambling arrangement selling short. There was no compulsion upon him to do anything, legal or moral compulsion. He was in to make money; as he stated, you either got into the government program or you weren't going to do much business. So he underbid the market.

He, according to his testimony, had to buy at 110. I think it may have been overstating it, but that's his testimony. He couldn't buy it. He couldn't buy it before October 14, at $110, 115, 120. In fact, he gave instructions to his bidder, Mr. Foley, that he wasn't

even to try to buy for a period of three weeks.

The record doesn't show, and it's unfortunate, but the facts are the facts, the record does not show what plaintiff would have had to pay for raisins had he made a real effort to pay what the demand price was of the growers. I don't know, we never will know how the market would have stabilized had [90] there been actual purchases in that period. You had a complete, almost a complete stalemate with practically no movement of raisins insofar as—there was physical movement, but as far as closing price movement is concerned for a period of almost two months. That wasn't engendered by the announcement of October 14. I honestly believe, your Honor, that too much stress is made upon that date.

The same situation prevailed after that date. It wasn't until November that the price had begun to go up. They were in a position that they would have to buy. They had then started making tremendous commercial sales; they couldn't stay out of the market forever. But I submit that it wasn't the purchase of the 60,000 tons which was the substantial reason for the fact that they paid more than $110. It was the determination of the raisin growers that they weren't going to take 50 or 60 per cent of parity for their crop.

Also with respect to the question of equity, you got to consider what did happen. It might have been a far brighter picture for the plaintiff had they then said, "Well, a contract is a contract, I am going to go in and I am going to buy and I am going to sue you." But he didn't do that. He waited—he waited.

He waited until it came to the point where he had so many raisins and the demand commercially had dropped off to such a point that he had to dispose of them to the Government or he was just stuck with them. So he disposed of them to the [91] Government, and I suggest that he disposed of them at a much lower price than $135. I suggest that he disposed of them at approximately $115 to $120.

And let me call your Honor's attention to one of his letters, Plaintiff's Exhibit No. 31, in which he states—this was a letter to Sheridan Downey of January 23, 1948, and it concerns the discussion that had been had with Secretary Anderson on December 4 concerning renegotiations, and he states in here:

"In the course of this conversation the Secretary assured me that the legal validity of our position was recognized, and that he would secure a statement to that effect from the Solicitor's Office and would renegotiate our contracts to a base price of $125 to $130 a ton,——"

note this, please——

"——which would not give us a profit but would cancel any loss we might otherwise suffer."

$125 to $130 a ton. That means that if this is an honest statement, and I have no reason to believe that it is not, that all he needed in a government contract to come out whole was a spread of twenty-five—twenty to twenty-five dollars. You might wonder very well how under the testimony where the minimum figure mentioned was $35, how that can be rationalized with this statement that twenty to twenty-five dollars would [92] bring them out of the

hole. But I suggest, and I am not—again I will say I don't know where it is in the record or if it is in the record, but included in the $35 to $40 price is some profit. Now, this twenty to twenty-five price does not include profit. I don't know what profit there is in the raisin industry. I don't suppose that it is that high. But included in these commercial—in the commercial spread, your Honor, you have what is called the brokerage fee, meaning he has to pay a broker to sell them. In the government sales there is nothing like that, and that, I understand, is a considerable expense.

So my conclusion is that to come out whole he only needed a spread of $20 to $25. He paid 116, according to our theory he paid 116, he received 150 or $151—say an average of $150—he had a $34 spread, and according to his own testimony here he didn't need anywhere near that. Where is his damage?

I don't believe that he has been hurt to the extent that he has indicated in this case—and you will exclude it—but I think it bears on the point. I think you will remember we introduced a statement of profit and loss which showed a profit.

The Court: I am coming to that, counsel. Curiously enough, I have it right in front of me. I intended not to interrupt you, but ask you at the conclusion of your discussion what evidentiary significance this might have at the present [93] juncture. You made reference to it in the brief.

Mr. Eardley: I don't know——

The Court: You go back to the year 1938. I will hand it over to you.

Mr. Eardley: I am familiar with it.

The Court: I would suggest you take it up after the recess.

Mr. Eardley: I can give you my observation right now; I will be very brief.

The Court: All right.

Mr. Eardley: I don't see what relevance it has to the case, except on the matter of credibility, and there again I am reluctant to say that because I think that possibly Mr. Grady didn't know at the point he made a certain statement what the facts would turn out to be. If you will remember, in a letter, I believe to Sheridan Downey, dated February 4, 1948, he stated that he was going to renegotiate, and he was going to renegotiate on the basis that they were losing money on their entire raisin crop, that that had been challenged and he was going to prove it in Washington that this was going to result in an over-all loss.

Now, there wasn't an over-all loss. I think Mr. Grady was unduly pessimistic. I won't say he wasn't telling the truth, because I suppose at that particular time he didn't know what the truth was. He was unduly pessimistic, and this only shows [94] that instead of the overall loss which he so determinedly stated he would prove, he actually came out with a profit.

That concludes the Government's argument.

The Court: Thank you. We will take a short recess, gentlemen.

(Short recess.)

Mr. Eardley: I have one observation. There has been called to my attention a point which I think may have some merit.

The Court: Yes, sir.

Mr. Eardley: You will remember that starting in October and right until January 21 the Government was given to understand that the plaintiff had not acquired the raisins for the contract. It wasn't until January 21 that the plaintiff first announced that it was now ready to go ahead and deliver. You will also remember that the delivery didn't commence until February and they continued until the end of March. So I suggest that it may have been that the Contracting Officer, noting that on the date that they offered to proceed that the market was well below what they needed to come out even, said they won't be hurt because if they haven't got the raisins they are now going to get them, the market is down to the point where they'll come out whole. Of course, the fact is that unbeknownst to him they had acquired raisins, some of which certainly went to the Government before the market break. [95]

Mr. Dinkelspiel: Your Honor will pardon my digressions for a moment to something that happened to me many years ago. I was in a case and we lost it in the trial court, and some bright man among my partners thought a new voice to the Court might be persuasive to get the judge to grant a new trial. So I spent my vacation studying the transcript of some 2,500 pages and when I got up to address the Court—your Honor may remember Judge Murray, a rather arbitrary gentleman—he

says, "Who are you?" And I told him who I was. And he says, "Where do you come from?" And I said, "From the same office that tried this case." He said, "What are you going to do now?" I said, "I am going to move for a new trial." He said, "No, you are not."

"I am going to argue." "No, you're not; no man can argue a motion for a new trial in this court who hasn't been in the trial."

Now, I don't want to say that to Mr. Eardley presenting matters to your Honor, but I do think there is something that does happen when you don't live through the excitement, let us say, of a trial. When we talk of how this thing might be adjusted and whether Mr. Grady might have known certain things——

The Court: If I may interrupt you, perhaps the gentleman is taking an appellate review of the matter.

Mr. Dinkelspiel: Yes, your Honor, that is actually what must necessarily happen. [96]

Your Honor will recall the obvious feeling of Senator Anderson in this case. He wasn't going to give up a profit in a contract, and he wasn't going to let those, whatever you call them, packers "gouge" the government. And there were quite a few things that came out of his eyes and the tone of his voice, of other witnesses, of course, that are not reflected in the transcript. I said to counsel, and I say it again, that I thought some of his arguments today were persuasive and effective. I did say I didn't

think they happened to be supported by the record. And I have in mind such an argument as what may have been in the mind of the contracting officer, or what maybe Mr. Grady should have known.

Now, those things, if we can assume that Mr. Grady did know or should have known that the Government was going—the CCC was going to change its program, well, maybe Mr. Grady cannot assert damage for not having protected himself. But the record is clear, he did not know, he wasn't to be expected to know, and on the contrary, if your Honor please, your Honor will recall, and this, too, goes to both the cooperation of Rosenberg Bros. and to the whole status of the case, that Mr. Grady said the program was unsound. And he telegraphed back to the CCC and he asked that they change it, and he suggested a program of shipment abroad, your Honor may recall, the Webb-Pomerene program, and the answer came back, "You are expected to cooperate." [97]

* * *

Mr. Dinkelspiel: I will undertake to try to do that, your Honor. I would like to clear up one thing because of the remark that counsel—because of that exhibit that Your Honor asked about, that profit and loss thing of Rosenberg Bros. We objected to its introduction and we said if it was introduced we would have to go into the question of LIFO inventory, and the profit of Rosenberg Bros. that year was the result of the LIFO inventory method, which, as your Honor know , purely and simply is a method

of—an accounting method. It has to do with a tax condition.

There was an article in San Francisco paper this morning, "Don't fool yourself about LIFO," coincidentally enough.

"As a method of accounting we have no quarrel with LIFO, but as a protection against business loss due to price changes is something else again."

The Court: Do you have any objection to this matter being incorporated?

Mr. Dinkelspiel: Yes, your Honor, because it is not a true and correct statement of the profits and the business profits on raisins for the year in question.

The Court: Counsel for the Government referred to it in [102] the brief and you in your brief took exception to it, said it had no place.

Mr. Dinkelspiel: We do, because it needs explanation, your Honor. The LIFO business is the explanation. Your Honor, I recall, is one of the few jurists in this country that is familiar with LIFO, I believe; I think you have had it before you on a number of occasions. But that is a LIFO inventory reflection, that profit and loss statement, as distinguished from a true statement of the business done in that year.

* * *

[Endorsed]: Filed January 6, 1955. [103]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. CalBreath, Clerk of the United States District Court for the Northern District of California, do hereby certify the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this court in the above-entitled case and that they constitute the record on appeal herein as designated by the attorneys for the appellant:

Complaint for Damages for Breach of Contract.

Answer.

Notice of Motion to Strike Certain Affirmative Defenses From Defendant's Answer and Motion.

Order to Strike Affirmative Defenses Denied.

Notice to Amend Answer.

Memorandum Opinion and Order for Judgment.

Order Defendant to Lodge Proposed Amendments.

Findings of Fact and Conclusions of Law.

Judgment.

Notice of Appeal by Defendant.

Notice of Cross-Appeal by Plaintiff.

Cost Bond on Appeal of Plaintiff.

Order Extending Time to Docket Appeal of Defendant.

Order Extending Time to Docket Appeal of Plaintiff.

Appellant's Designation of Record on Appeal.

Appellee's Designation of Record on Cross-Appeal.

Proceedings on Trial, Reporter's Transcript, Volumes 1 to 16, Inclusive.

Plaintiff's Exhibits No. 1 to 58, Inclusive.

Defendant's Exhibits Lettered A to Z, Inclusive and AA to AO, Inclusive.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 28th day of September, 1955.

[Seal] C. W. CALBREATH,
Clerk.

By /s/ WM. J. FLINN,
Deputy Clerk.

[Endorsed]: No. 14884. United States Court of Appeals for the Ninth Circuit. Commodity Credit Corporation, Appellant, vs. Rosenberg Bros. & Co., Inc., a corporation, Appellee, and Rosenberg Bros. & Co., Inc., a corporation, Appellant, vs. Commodity Credit Corporation, Appellee. Transcript of Record. Appeals From the United States District Court for the Northern District of California, Southern Division.

Filed September 28, 1955.

/s PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
Ninth Circuit
No. 14884

COMMODITY CREDIT CORPORATION,
Appellant,

vs.

ROSENBERG BROS. & CO., INC.,
Appellee.

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY

The Commodity Credit Corporation, appellant herein, states that the points on which it intends to rely are as follows:

1. The District Court erred in holding that defendant breached an implied obligation not to hinder, or increase the cost of, performance of Rosenberg Bros. & Co.'s (hereinafter referred to as R. B. & Co.) Government contracts.

2. The District Court erred in finding that the changes in Docket OC-95a of October 14, 1947, October 17, 1947, and November 26, 1947, were radical departures from the program announced on September 5, 1947, and breached R. B. & Co.'s implied agreement with Commodity Credit Corporation (hereinafter referred to as CCC).

3. The District Court erred in finding that the parties did not and could not contemplate the possibility that CCC might modify the program announced in the press release of September 5, 1947,

and that R. B. & Co. did not assume the risk of modification.

4. The District Court erred in finding that there was a clear understanding on the part of R. B. & Co. and CCC that the press release of September 5, 1947, established the future course of conduct on the part of CCC.

5. The District Court erred in finding that the press release of September 5, 1947, was issued by Secretary Anderson, acting on behalf of CCC, with contractual intent, and that R. B. & Co. bids were submitted in reliance on said press release.

6. The District Court erred in finding that the amendment of October 14, 1947, was not made known to R. B. & Co. before that date.

7. The District Court erred in finding that CCC knew that the independent packers including R. B. & Co., were in a short position until as late as October 23, 1947.

8. The District Court erred in finding that R. B. & Co. did not sell short with the purpose of making a large profit, but that R. B. & Co.'s offers to sell were dictated by a desire to cooperate in the 1947 raisin purchase program.

9. The District Court erred in finding that the generally accepted "spread" between the price of processed Thompson seedless raisins in bulk, in packages and the price of naturally conditioned Thompson seedless raisins was slightly in excess of $40.00 per ton, and in finding that the offers made

pursuant to announcements No. 1 and No. 2 for processed raisins reflected a field price for naturally conditioned raisins of a price of approximately $110 per ton.

10. The District Court erred in finding that the press release of September 5, 1947, resulted in depressing the raisin market to a field price of approximately $110 per ton.

11. The District Court erred in finding that had the CCC program remained as announced on September 5, 1947, R. B. & Co. could have purchased naturally conditioned raisins at $110 per ton or less.

12. The District Court erred in apparently assuming that defendant has admitted that had there been modification of program, R. B. & Co. could have purchased raisins at an average price of $110 per ton.

13. The District Court erred in holding that the raisin purchase program of CCC was a corporate, commercial and private act, not involving the exercise of Governmental and/or sovereign powers.

14. The District Court erred in holding that R. B. & Co. did not waive its right to claim damages resulting from the alleged breach of contract by CCC.

15. The District Court erred in finding that plaintiff established damages in the amount of $160,366.88.

16. The District Court erred in finding that the immediate result of the change in docket announced

on October 14 and October 17, 1947, was a rise in raisin prices to a level in excess of $135 per ton, in finding that the modification of November 26, 1947, constituted a price support of $135 per ton, and in finding that the modification of November 26, 1947, together with price amendments, was to fix a field price for raisins at a level of $130 to $135 per ton.

17. The District Court erred in finding that the modifications of Docket OC-95a raised prices to artificially and abnormally high levels, and in finding that R. B. & Co. was unable, before November 26, 1947, to cover its sales commitment to CCC because of such abnormally and artificially high price levels.

18. The District Court erred in finding that the amendments to the docket were the direct and proximate cause of the damages claimed herein.

19. The District Court erred in finding that R. B. & Co. could not have acquired raisin for delivery to CCC at an average of less than $120.50 per ton, and in finding that by reason of the changes in docket, R. B. & Co. was damaged in the sum of $160,366.88.

LLOYD H. BURKE,
United States Attorney,
Attorney for Defendant.

By /s/ CHARLES ELMER COLLETT,
Assistant United States Attorney.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed September 30, 1955.

In the United States Court of Appeals
Ninth Circuit

No. 14884

COMMODITY CREDIT CORPORATION,

Appellant.

vs.

ROSENBERG BROS. & CO., INC.,

Appellee.

STATEMENT OF POINTS ON WHICH CROSS-APPELLANT INTENDS TO RELY

Rosenberg Bros. & Co. Inc., cross-appellant herein, states that the points on which it intends to rely on this cross-appeal are as follows:

1. The measure of cross-appellant's damage should have been greater than the minimum cost at which it could have acquired raisins to fulfill its Commodity Credit Corporation contracts.

2. The District Court erred in finding that cross-appellant was damaged only in the sum of One Hundred Sixty Thousand Three Hundred Sixty-six Dollars and Eighty-eight Cents ($160,366.88) as a result of Commodity Credit Corporation's actions in breach of its implied contract not to prevent or hinder performance or render performance by cross-appellant more expensive.

Dated: October 11, 1955.

LLOYD W. DINKELSPIEL,

EDWARD W. ROSSTON,

HELLER, EHRMAN, WHITE & McAULIFFE,

MELVILLE EHRLICH,

BELL AND EHRLICH,

By /s/ EDWARD W. ROSSTON,
Attorneys for Cross-Appellant.

Receipt of Copy acknowledged.

[Endorsed]: Filed October 12, 1955.

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AUG 9 1957
JOHN T. FEY, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 357

ROSENBERG BROS. & CO., INC.,
a corporation,
Petitioner,

vs.

COMMODITY CREDIT CORPORATION,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. .....

ROSENBERG BROS. & CO., INC.,
a corporation,
Petitioner,

vs.

COMMODITY CREDIT CORPORATION,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

To the Honorable Earl C. Warren, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the United States:

Petitioner, Rosenberg Bros. & Co., Inc., a corporation, prays that a writ of certiorari be issued out of and under the seal of this Honorable Court to review the judgment of the United States Court of Appeals for the Ninth Circuit, filed and entered on the 7th day of March, 1957 (petition for rehearing and for hearing in bank denied May 13, 1957),

which reversed a decision of the District Court for the Northern District of California, Southern Division in favor of Plaintiff (Petitioner herein).

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit of which this petition seeks a review was officially reported in 243 F.2d 504, et seq. The opinion of the District Court for the Northern District of California, Southern Division, appears in the printed record before the Court of Appeals for the Ninth Circuit at page 51 et seq., and in the official reports in 123 F.Supp. 764. A copy of the decision of the United States Court of Appeals for the Ninth Circuit appears in the Appendix hereto.

GROUNDS ON WHICH JURISDICTION INVOKED

The opinion and judgment of the United States Court of Appeals for the Ninth Circuit was filed and entered on March 7, 1957, and the petition for rehearing and for rehearing in bank was denied on May 13, 1957. Jurisdiction to review this case on a writ of certiorari is conferred upon this Court by Title 28 U.S.C. Section 1254.

QUESTIONS PRESENTED

The questions presented by this petition are:

(1) Whether the Court of Appeals for the Ninth Circuit has decided an important question of Federal law which has not been, but should be, settled by this Court, to-wit: The express or implied contractual liability of the Commodity Credit Corporation (hereinafter referred to as CCC), an agency of the United States Government, in its dealings with private contracting parties under an industry-wide program.

(2) Whether the Court of Appeals for the Ninth Circuit has in this proceeding so far departed from the accepted and usual course of judicial proceedings and from decisions of the United States Supreme Court as to call for an exercise of this Court's power of supervision.

(3) Whether the Court of Appeals for the Ninth Circuit has rendered a decision in conflict with another decision in the same circuit and with decisions of the courts of other circuits on an identical issue.

(4) Implicit in the decision of the Court of Appeals in this matter is the further question of whether or not a corporate agency of the United States, in its dealings with individuals and corporations, is to be held to the same standards of contractual obligations and ethics as are the persons and corporations with whom it is dealing.

STATUTES AND RULES INVOLVED

Fed. Rules of Civil Procedure, Rule 52(a):

"Rule 52. Findings by the court.

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. *Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.* The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions

of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b). (Emphasis Added)

STATEMENT OF THE CASE

This case is one of ten similar cases* involving substantially all the independent packers in the raisin industry. In July, 1947, an Industry Committee in which Department of Agriculture officials participated, as well as the Department itself, estimated the 1947 industry surplus of Thompson seedless raisins at 100,000 tons or more. With this estimate before him, Clinton Anderson, the then Secretary of Agriculture (who was also Chairman of the Board of CCC, and exercised all rights of stock ownership on behalf of the United States) stated his determination not to support prices for dried fruits; and further stated that he would purchase no more dried fruit than could be used by the school lunch program, by the program of regular shipment

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*Nine other cases are pending in the United States District Court for the District of Columbia:

TITLE	CIVIL ACTION NO.
Vagim Packing Company v. Commodity Credit Corporation	4474-50
Central California Packing Company v. Commodity Credit Corporation	4475-50
Lion Packing Company v. Commodity Credit Corporation	4476-50
Enoch Packing Company, Incorporated v. Commodity Credit Corporation	4477-50
Bonner Packing Company v. Commodity Credit Corporation	4478-50
Fewel Bros. Packing Company v. Commodity Credit Corporation	4479-50
Central Valley Raisin Company v. Commodity Credit Corporation	4480-50
West Coast Growers and Packers, Inc. v. Commodity Credit Corporation	4481-50
Hunt Foods, Incorporated v. Commodity Credit Corporation	4482-50

to the Armed Forces, and by subsidizing export into the Northern countries where dried fruits were an important and valuable part of the diet; that CCC's dried fruit purchase program offered a decidedly limited outlet; and that there would be no waste of product as there had been in the case of potatoes. Anderson also indicated that CCC would take raisins only at prices at which they could move into countries where foreign exchange was a problem, and at which CCC could resell to the Army which was at the time "somewhat of a tough trader".

With this background, Anderson, serving also as Chairman of the Board of CCC, on September 5, 1947, issued a carefully prepared announcement to packers, growers and the public of the general outline of the dried fruit program which CCC had adopted as Docket OC-95a. (Plaintiff's Exhibit 5). The announcement stated that CCC would purchase up to a *maximum* of 61,000 tons of raisins *from processors and packers,** and expressly stated that the program "does not provide price support at any given level". Purchases were to be made on the basis of competitive bidding. This was the only announcement of the *entire* purchase program.

Rosenberg Bros. & Co. (hereinafter referred to as Rosenberg), to whose claim Petitioner has succeeded by operation of law, was one of the most important packers in the raisin industry. It, together with other packers, (all of whom were in a short position at the time CCC called for bids†) urged

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*The words "processors" and "packers" have identical meaning for the purpose of this petition.

†In the early season before raisins were made, packers were normally and necessarily in a short position. This situation was aggravated in 1947 by grower resistance to sales at prevailing market prices. CCC had knowledge of the packers' short position when it accepted their bids.

CCC not to put this kind of a program into effect as it would work out uneconomically. Calling for *competitive* bids on a *maximum* of 61,000 tons of raisins in the face of a known estimate of a 100,000 ton surplus would depress prices. Rosenberg even suggested an alternative procedure. Nevertheless, Rosenberg and other packers were told that the program "as announced" by CCC was a substantial contribution toward stabilized conditions in the industry and were instructed to "cooperate".

Accordingly, Rosenberg committed itself to sell to CCC a total of 14,333 tons of processed raisins at prices ranging from $149.40 to $152.00 per ton. Rosenberg's formal offers for parts of the tonnage on which CCC had called for bids, were made on mimeographed CCC bid forms, and CCC accepted the formal offers by telegram. Rosenberg's last offer for 4,330 tons was accepted by CCC by night-letter dated October 13, 1947. Prior to this time, on October 9, 1947, unknown to the packers and processors, CCC had changed its mind about the type of program which it wanted to put into effect, and had determined *first,* to increase the maximum quantity of raisins to be purchased from 61,000 tons to 121,000 tons (a tonnage in excess of the indicated surplus) and *second,* to accept offers from raisin growers, and others in physical possession of raisins, in direct competition with processors and packers. These changes were announced to the packers on October 14 after their bids had been accepted. Later, on November 26, 1947, CCC announced that it would require all processors to certify that they had paid growers not less than $135.00 per ton for natural condition raisins. (Note: The spread between the price of natural condition raisins and the price for processed raisins called for by CCC was established and found to be $40.00 per ton. In order to avoid a

loss on sales to CCC at $150.00 per processed ton, it was necessary for the packers to buy from growers at not more than $110.00 per ton.) The certification requirement, contrary to CCC's original announcement of September 5, 1947, in effect, supported field prices for natural condition raisins at a level of $135.00 per ton. The October 14 changes in CCC's program, together with the November 25 certification requirement, necessarily meant that packers who purchased raisins to cover their short position on their CCC bids, at a price artificially stabilized at or near $135.00 per ton would be out of pocket approximately $25.00 per ton.

The change of the CCC requirements, contrary to CCC's original announcement, put CCC in the market for more than the indicated surplus instead of only 61,000 tons, put CCC in direct competition with packers for grower's raisins, and instituted a price support program. Immediately after the announcement of these changes in the program, Rosenberg and other packers sought to cancel their contracts with CCC. Rosenberg even went so far as to offer to cancel all of its existing grower contracts for raisins that called for firm prices of less than $140.00 per ton, which would have enabled the released growers to enjoy the benefits of the new CCC program. Despite the recommendations of his CCC advisors, including S. R. Smith, the head of the Fruit and Vegetable Branch and author of CCC's dried fruit purchase docket, Secretary Anderson refused to cancel or renegotiate the packer contracts. He testified that his reason was that a business deal had been made and CCC could not give up a favorable contract at a low price.* For a period of months thereafter Rosenberg sought to obtain relief from its CCC commitments but met with no success.

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*His insistence on performance of these low-priced contracts is characteristic of an ordinary commercial purchase by CCC rather than of a price support program.

After the change in program was announced on October 14, 1947, growers became strong holders, and it was impossible for Rosenberg and the other packers to cover their contracts with CCC except at a loss. Rosenberg did cover its CCC commitments at prices which resulted in a substantial loss. Despite continuing negotiations to adjust this matter, CCC insisted that Rosenberg perform its contracts, and on January 26, a formal demand was made on it. After an exchange of telephone calls and telegrams with CCC's contracting officer, Rosenberg delivered the raisins but actively continued its efforts to obtain relief from CCC during the period of delivery and afterwards.

The trial court held that CCC had breached its implied contract not to hinder Rosenberg's performance or render it more expensive, and found that as a result of such breach, Rosenberg had suffered damages in the amount of $160,366.88. CCC appealed this judgment to the Court of Appeals for the Ninth Circuit. Rosenberg contended that its damages were in excess of $320,000.00 and cross-appealed on that issue.

The Court of Appeals completely rejected Rosenberg's position and the decision of the trial court, holding that even if CCC had breached a contract with Rosenberg by changing its program on October 14, 1947, Rosenberg should have minimized its damages by doing nothing after CCC's breach. In other words, Rosenberg, the innocent party to the contract, should have ignored CCC's insistence on performance and the pending attempts at settlement, and should have taken no steps to cover its contract with CCC. This decision would require Rosenberg to determine at its peril whether CCC's breach was a good defense to an action by CCC for nonperformance. Moreover, had Rosenberg and other packers in a similar position taken no steps to cover

their CCC commitments, an industry disaster would have resulted. The Court of Appeals also held that there was no contract which precluded CCC from changing its program to the damage of the obligated processors; that there was no implied contract on the part of CCC not to prevent or hinder the packers' performance; and that Rosenberg in delivering raisins to CCC and billing the CCC on standard voucher forms, had waived any claim to damages.

BASIS OF FEDERAL JURISDICTION IN COURT OF FIRST INSTANCE

The jurisdiction of the Court of first instance in this matter is based upon Title 15 U.S.C. Section 714(b)(c).

> "The District Courts of the United States * * * shall have exclusive original jurisdiction of all suits by or against the Corporation [Commodity Credit Corporation]."

ARGUMENT

(1) The Court of Appeals Has Decided an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by This Court.

Implicit in the decision of the Court of Appeals is a dictum that CCC in its dealings with private contracting parties under an industry-wide program is not subject to the usually implied obligation not to hinder or prevent performance by the other party. In spite of the extended attention to this point in briefs of counsel, the Court of Appeals dealt with it in a summary fashion and its pronouncements on the issue are merely dicta. The actual *ratio decidendi* of the Court's opinion is that had Rosenberg acted so as to minimize its damage, it would allegedly have suffered no damage, and that in any event Rosenberg waived any right to damage by delivery.

There was presented to the Court an important question, to-wit: What is the effect of a carefully prepared announcement of a CCC commodity purchase program by the Secretary of Agriculture, publicly made and mailed to packers including Rosenberg, following preceding studies and prior announcements to the effect that there would be no price support at any given level and that only limited quantities which could be used for specified purposes would be purchased. In asking—actually, demanding—that the industry comply with the program "as announced", and in accepting bids made in reliance on such announcements, was there not clearly established a contractual relationship? Or, if any of the elements of an express contract were lacking (a question which the United States District Court did not decide) was CCC not subject to an implied obligation not to hinder or prevent performance by the processors involved, including Rosenberg? This implied promise, as suggested by the Court of Appeals, does not depend upon the theory that the September 5th announcement was a *part* of the contract, or that CCC *agreed* not to purchase more than 61,000 tons, to purchase only from processors and packers, and not to support prices. The implied promise is not to hinder or prevent the processors from performing their part of the contract. CCC's change in program did render performance by Rosenberg and other packers more difficult and expensive. Rosenberg did not, as stated by the Court of Appeals (contrary to the finding of the trial court), assume the risk of a change in program.

A contract not to hinder or prevent performance by the other party to a contract is "nearly always" implied. 3 *Corbin on Contracts* (1951 Ed.) § 571; 4 *Ibid.* § 947; *Patterson v. Meyerhofer* (1912) 97 N.E. 472, 204 N.Y. 96. It is only upon proof of exceptional circumstances that the other

party is regarded as having "assumed the risk" of hindrance. *Restatement of Contracts*, § 315; *Williston, Contracts* (Rev. Ed.) § 1293-A. Clinton Anderson's September 5th announcement, even if it be regarded merely as a statement of policy, was clear and unequivocal. In the light of subsequent conduct of CCC officials rejecting any change in the program "as announced", it cannot be held that Rosenberg "assumed the risk" of a change in program.

The Government of the United States and any agency thereof in its dealings with individuals and corporations should be held to the same standards of contractual obligations and ethics as are the persons and corporations with whom it is dealing. This statement would seem too obvious to require the attention of this Court, but throughout the decision of the Court of Appeals there is every indication that what is good for the goose is not necessarily good for the gander. Had a private individual made the announcement of September 5th, and made statements as to the purpose and limitations of it, there is no doubt that the announcement would have been construed either as part of the contract with the individual processors, or as representation precluding assumption of risk that the performance of the contract would be interfered with or prevented. Had such a statement been made with an intention to deceive or to induce the processors to purchase, it actually would have been considered fraudulent in its nature.

The trial court found that the September 5th announcement induced Rosenberg and other processors to enter into the formal contracts with CCC and that a necessarily implied term thereof was that there would be no interference with Rosenberg's contractual performance. How, in the light of this finding, the Court of Appeals could find otherwise, with no additional or other evidence before it, is incomprehensible.

It is respectfully submitted that this Honorable Court should unequivocally decide, for guidance of the courts of the various circuits, whether a Government agency's representations or contracts should be treated in the same manner as those of private individuals. If the Court of Appeals intended to find such a difference on the grounds of sovereign immunity it should have so declared. Nowhere does the opinion of the Court of Appeals deal with the question of sovereign immunity despite the fact that it was strenuously argued and briefed at length. Of course, petitioners do not believe that sovereign immunity excuses the action of the Government in the instant case, but petitioners do contend that the silence of the Court of Appeals on this point, alone, would call for consideration by this Honorable Court.

The importance of the questions here involved is emphasized by the nine other actions brought on similar facts by substantially all of the independent raisin packers now pending before the District Court for the District of Columbia, which require guidance of the United States Supreme Court for their ultimate disposition.

(2). The Decision of the Court of Appeals Has Departed from the Accepted and Usual Course of Judicial Proceedings and from Decisions of the United States Supreme Court and Decisions in Other Circuits.

(a) MITIGATION OF DAMAGES.

The holding of the Court of Appeals that Rosenberg—whether or not it had been induced to enter into its contract by fraud, or whether or not CCC had any contractual obligation, express or implied—had the duty, effective immediately upon learning of the drastic change by CCC of its originally announced raisin purchase program, to reduce damages by not covering on its contractual obligation, clearly calls for a final determination by the highest tribu-

nal. Such a determination is particularly necessary because of the fact that a Federal agency was the contracting party pressing for performance by Rosenberg.

The Court of Appeals in deciding this question, looking at the matter coldly from its elevated bench, completely ignored the evidence before the trial court and applied legal principles as if this were a case for mitigation of damages after *repudiation* by CCC. It ignored the findings of fact that throughout the period when Rosenberg covered its CCC commitments, CCC was insisting on performance,* and Rosenberg was seeking an adjustment from CCC which would be fair to both parties; and that such adjustment had the approval of the head of the Fruit and Vegetable Branch, the man in charge of the 1947 Dried Fruit Purchase Program (Plaintiff's Exhibit 50), though denied by the Secretary of Agriculture.

The Court made an error of law in applying the principle of mitigation of damages to the facts of this case. CCC's breach of its contract coupled with its continuing insistence on performance, gave Rosenberg an election of remedies (1) to rescind; (2) to treat the contract as broken and sue for damages; or (3) to consider the contract as binding, continue the performance and sue for damages for breach. An innocent party to a contract *may* stop his performance upon breach by the other party, but he is not *required* to do so. He may continue to perform, insofar as he is permitted, and then claim damages for the breach of contract. It has been so held in another circuit.

> *Bu-Vi-Bar Petroleum Corp. v. Krow* (C.C.A. 10, 1930), 40 F.2d 488, 490.

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*The trial court found (Finding 38) that Rosenberg "continually and consistently sought cancellation" of its contracts, but "CCC refused at all times to cancel" and "continually and repeatedly insisted on delivery".

The great weight of authority is in accord.

Winans v. Sierra Lumber Co. (1884), 66 Cal. 61, 4 Pac. 952;

2 *Fed. Law of Contracts*, § 429;

5 *Corbin on Contracts* (1951 Ed.), § 1105, p. 469;

Williston, Contracts (Rev. Ed.), § 1298.

The rule of mitigation of damages, which requires the innocent party to cease performance upon breach by the other party to a contract, applies only in case the other party *repudiates* the contract or breaches it in a manner tantamount to a repudiation. Here CCC not only failed to repudiate its contract with Rosenberg but, indeed, insisted on performance after its breach.

(b) FAILURE TO FOLLOW FINDINGS.

The Court of Appeals in this matter has thoroughly and completely ignored the findings of fact of the trial court, without finding that the evidence was not sufficient to support them. (Actually it was more than sufficient to do so.) If this Honorable Court will compare the trial court's findings with the opinion of the Court of Appeals, it may well wonder if both courts considered the same case.

It does not, of course, appear from the cold record that this was a rather dramatic case in which Secretary of Agriculture Anderson showed on the witness stand his spleen against and animosity toward the packers in general (Record pp. 243-244; 306-309; 447). This is illustrated by the very fact that Secretary Anderson took a positive view, contrary to that of responsible department technicians with respect to adjustment of the packer contracts, referred to the packers in rather uncomplimentary terms, and announced that he would "teach them a lesson". The then Cali-

fornia Senator, Sheridan Downey, testified as to his efforts to assist in this matter, as to how unfair the transaction had been, as to how he had almost obtained relief and then failed. These and other dramatic circumstances, including the forthright demeanor of plaintiff's witness Dwight Grady, make the judgment of the trial court on factual matters superior to the review thereof by the appellate tribunal. The Court of Appeals has completely ignored the findings of the trial court. For example, whether Rosenberg made delivery without waiving its rights is a question of fact. The trial court found that there had been no waiver and that Rosenberg had continuously from and after October 14, 1947, pressed its claim for adjustment of its CCC contracts. Witness what the Court of Appeals has to say on this issue:

> "There was, in fact, no disputed claim on Rosenberg's part, which was advanced by it or recognized by the government, when Rosenberg performed the contracts."

Where did the Appellate Court find evidence of this? There are other illustrations of utter disregard of the findings. The important finding of the trial court that Rosenberg did not assume the risk of a change in CCC's program, and that Rosenberg was entitled to damages because of injuries suffered, and similar findings vital to the conclusions of the Court, were completely and thoroughly disregarded. We submit that this definitely is a violation of the accepted and usual course of judicial proceedings, of Rule 52(a) of the Federal Rules of Civil Procedure, and of prior decisions of the United States Supreme Court.

Walling v. General Industries Co. (1947), 330 U.S. 545, 91 L.Ed. 1088;

Graver Tank & Mfg. Co. v. Linde Air Products Co. (1949), 336 U.S. 271, 93 L.Ed. 672, *aff'd* 339 U.S. 605, 94 L.Ed. 1097.

This violation calls for exercise of this Honorable Court's supervisory power.

(3) The Decision of the Court of Appeals for the Ninth Circuit as to the Effect of Execution of Government Vouchers Is in Conflict with Another Decision in the Same Circuit, as Well as with a Decision in Another Circuit.

In the instant matter the Court of Appeals held that Rosenberg's use of standard voucher forms, in billing CCC for raisins delivered, which forms included a statement that the bills presented were "correct and just" and that all conditions applicable to the transactions had been complied with, and Rosenberg's acceptance of payment of these vouchers, waived any claim for damages on account of CCC's breach of contract. This holding completely disregards Rosenberg's conduct up to and after the very time of execution of the vouchers. During this entire period Rosenberg was actively and continuously pursuing its claim for additional damages, and the trial court so found. Not only is the holding of the Court of Appeals contrary to the finding of the trial court, but, important for consideration of this petition for a writ of certiorari, it is in conflict with the decision of the court in *Lundstrom v. United States* (D. Ore. 1941) 53 Fed. Supp. 709, 711, aff'd (C.C.A. 9, 1943) 139 F.2d 792. It is also in conflict with the decision of the Eighth Circuit in *Blair v. United States* (C.C.A. 8, 1945) 147 F.2d 840, modified in other respects (C.C.A. 8, 1945) 150 F.2d 676.

CONCLUSION

The decision of the Court of Appeals for the Ninth Circuit failed to decide an important question of law which should be settled by this Court; it departed from the accepted and usual course of judicial proceedings and is in conflict with prior decisions of the United States Supreme Court, as well as with another decision in the Ninth Circuit and a decision in another circuit on an identical issue. Accordingly, it is respectfully submitted that this petition for a writ of certiorari should be granted so that the said decision of the United States Court of Appeals for the Ninth Circuit may be reviewed and, upon review, reversed by this Honorable Court.

Dated at San Francisco, California, this 29th day of July, 1957.

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(Appendix Follows)

Appendix

United States Court of Appeals
For the Ninth Circuit

No. 14,884—Mar. 7, 1957

Commodity Credit Corporation,
Appellant,

vs.

Rosenberg Bros. & Co., Inc., a Corporation,
Appellee.

and

Rosenberg Bros. & Co., Inc., a Corporation,
Appellant,

vs.

Commodity Credit Corporation,
Appellee.

Upon Appeal from the United States District Court for the Northern District of California, Southern Division

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Before: DENMAN, Chief Judge, and MCALLISTER and BARNES, Circuit Judges.

MCALLISTER, Circuit Judge.

OPINION

Rosenberg Bros. & Co., Inc., hereinafter called "Rosenberg," sued the Commodity Credit Corporation, hereinafter called "Commodity" or "the government," for breach of con-

tract, and, on a trial before the district court, sitting without a jury, secured a judgment in its favor in the amount of $160,366.88. Both parties appeal, Rosenberg claiming that it is entitled to more; the Commodity Credit Corporation claiming that it is entitled to nothing.

The background of the case is as follows: On September 10, 1947, pursuant to a government program to support and stabilize the prices of dried fruits, the Secretary of the Department of Agriculture, who was also the Chairman of the Commodity Credit Corporation, asked for offers for the sale of 30,000 tons of raisins and various quantities of other dried fruits. Rosenberg, on September 19, offered to sell 10,000 tons of raisins to Commodity at prices ranging between $151 and $152 per ton, according to the kind of containers used. Rosenberg's offer was accepted by Commodity on September 23. On September 24, a standard government contract was executed between Rosenberg and Commodity, by the terms of which Rosenberg agreed to deliver 10,000 tons of raisins to Commodity in the period October 1-December 15, 1947, upon demand and at the prices set forth in the contract. These raisins were never delivered in accordance with the contract. Rosenberg, at the time it executed the contract, did not have the raisins on hand or available. It was selling them in the expectation that raisins would drop in price sufficiently to enable it to fulfill the contract without loss. On October 1, 1947, the Department of Agriculture asked for further bids for the sale of dried fruits, including 31,000 tons of raisins. A week later, on October 8, Rosenberg offered to sell Commodity 10,000 tons of raisins, and on October 13, Commodity accepted Rosenberg's offer to the extent of 4,330 tons, priced at $149.40 per ton, and on the same day, a contract was executed for that quantity of raisins at the stated price.

On October 14, the Department of Agriculture announced further purchases, and asked for bids for an additional 60,000 tons of raisins. Rosenberg then requested cancellation of its contracts, but this request was denied.

On November 26, 1947, the purchasing program of raisins was modified by requiring all packers who *thereafter* sold Thompson seedless raisins (the kind here in question) to certify that they had paid the grower not less than $135.00 per ton.

At the time of the execution of the contracts, Rosenberg, as has been mentioned, had not purchased and did not have available raisins to fill the government contracts. It was selling short in the hope that raisins would drop in price sufficiently to enable it to fulfill the government contracts without loss. However, the growers refused to sell at the lower prices offered, and Rosenberg purchased only 800 tons during the period from September 1, 1947, to November 3, 1947, during which time it had agreed, in the written contract, to sell to the government a total of 14,330 tons of raisins.

After November 3, 1947, raisins were sold by growers in substantial quantities at prices ranging from $127.00 to $142.00 per ton. Since Rosenberg's normal processing and packing charges averaged $40.00 per ton, it was impossible for Rosenberg to purchase raisins from growers for sale to the government at $149.40 or $152.00 per ton, in compliance with its contracts, without suffering substantial loss.

The government continually demanded delivery of the raisins from Rosenberg; and Rosenberg continually refused to deliver, stating that it had no raisins available.

In January, 1948, the price of raisins dropped, and during that month, they were being sold by growers at prices ranging from $100.00 to $125.00 per ton. At that time,

Rosenberg decided to make delivery to the government, since, at that price, it would be enabled to purchase raisins at the lower prices, and fulfill its government contracts.

On January 22, 1948, Rosenberg requested shipping instructions and asked for an amendment to the contract, relating, however, only to reinstating the tonnage and extending the delivery dates. The government agreed to an amendment reinstating the tonnage and extending the delivery dates, and further agreed not to hold Rosenberg for damages for nondelivery, or delay in delivery, in return for Rosenberg's waiving all carrying charges. Delivery of the orders was then made by Rosenberg during February and March, 1948. Vouchers for the raisins delivered were submitted by Rosenberg and paid by the government. Thereafter, Rosenberg filed a claim against the government for damages for breach of an implied contract, on the theory that the government, through changes in its program of purchasing raisins, had obstructed Rosenberg in the performance of its contract, and, at the same time, had increased the cost of such performance. Upon the government's rejection of its claim, Rosenberg brought the present action, and the district court, sitting without a jury, entered a judgment in favor of Rosenberg in the amount of $160,366.88, from which the government appeals.

It is the chief contention of the government that there was no implied contract with Rosenberg, and, consequently, no breach of such a contract.

Rosenberg claims that a "press release" issued by the Secretary of Agriculture at Albuquerque, New Mexico, on September 5, 1947,[1] forms the basis of the implied contract;

[1]The press release is as follows:

"Secretary of Agriculture Clinton P. Anderson announced that Commodity Credit Corporation will purchase up to 133,000 tons of dried apples, dried peaches, dried prunes and raisins if the

and that, in effect, it became part of the contract when Rosenberg made an offer of sale of the raisins to the government based upon the terms of the press release, and upon which, the government accepted such offer. Rosenberg contends that the government breached its contract by purchases of raisins contrary to the terms of the press release and by subsequently imposing further conditions upon sales by Rosenberg which greatly increased the cost of Rosenberg's performance of its contract.

The government submits that the press release in question was not intended to create private contractual rights, and that it created none; that it contained no representations of a contractual nature; and that it was merely a declaration of policy.

When, on September 10, 1947, the government invited orders for the sale of 30,000 tons of raisins to be delivered during the period October 1, 1947 to December 15, 1947,

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purchase of this total quantity of dried fruits is necessary to provide outlets for the relatively large 1947 production. The purchases will assist the industry in disposing of this expected surplus of supply and provide an excellent food for foreign relief feeding and school lunches.

"The maximum limit of 133,000 tons is divided into purchase of 2,250 tons of dried apples, 3,750 tons of dried peaches, 61,000 tons of raisins, and 66,000 tons of dried prunes.

"Purchases of the dried fruits under the program will be made from processors and packers of dried fruits. An announcement will be issued soon inviting packers to submit offers on a portion of the quantity to be purchased.

"Most of the prunes procured by the Commodity Credit Corporation will be of the 70/80, 80/90, and 90/100 sizes. Raisin purchases will be confined to the Thompson Seedless variety.

"The purchase program does not provide price support at any given level, but is expected to result in reasonable prices to producers and consumers.

"Department officials stated that the program should enable the dried fruit industry to complete its plans for readjustment on a self-help basis. It was emphasized that Government purchases should not be regarded as the permanent solution of the dried fruit surplus problems."

there was no mention of its announcement of the press release of September 5, 1947. Furthermore, when, on September 19, 1947, Rosenberg submitted an offer to sell 10,000 tons of raisins to the government at prices ranging between $151.00 and $152.00 per ton, no reference was made, in such offer, to the press release. Finally, on September 23, 1947, when the government accepted Rosenberg's offer, and when, on the following day, a standard government contract was executed in which Rosenberg agreed to deliver 10,000 tons of raisins to the government during the period, October 1-December 15, 1947, upon demand and at the prices stated therein, no reference was made to the press release, either in the government's acceptance of Rosenberg's bid or in the terms of the formal written contract; and the same is likewise true of Rosenberg's sale to the government of 4,330 tons of raisins on October 13, 1947.

If this case is to be determined on the basis of written contractual stipulations between the parties—the invitation to bid, the bid, and the acceptance—the government is not liable to Rosenberg in any amount. It is only on the theory of some kind of implied contract that Rosenberg seeks to prevail.

Where the parties have deliberately put their engagement into writing, the writing is presumed to contain the entire contract, and all the prior and contemporaneous agreements are merged therein, and cannot be shown by parol evidence. The contract may be read in the light of surrounding circumstances in order more perfectly *to understand the meaning and intent of the parties;* but where a contract is unambiguous, there is no need to ascertain the meaning and intention of the parties outside of the terms of the agreement. *United States v. Fidelity & Deposit Co. of Maryland,* 152 F.596 (C.C.A. 2). The rule that the surrounding circum-

stances should be considered does not apply where the language of a written agreement is plain, and not susceptible of more than one meaning.

Rosenberg, however, relies upon the rule that each party to a contract impliedly agreed not to prevent the other party from performing, or to render performance impossible by any act of his own. It contends that the government agreed not to purchase more than 61,000 tons of raisins during its entire program, and, moreover, that the purchases would be made from processors and packers; and this contention is based solely on what was set forth in the press release above mentioned,[2] none of which was mentioned or referred to in the written contract executed between the government and Rosenberg. By virtue of the press release alone, Rosenberg founds its case on breach of implied contract. We do not consider that the government can be held to have agreed with Rosenberg, implicitly or expressly, by virtue of the press release, not to purchase more than 61,000 tons of raisins; and that a subsequent purchase by the government of more than this amount gave Rosenberg a right to damages.

The government agency here involved, the Commodity Credit Corporation, was created by Congress for the purposes, among others, of stabilizing and protecting farm income and prices; of assisting in the maintenance of balanced and adequate supplies of agricultural commodities, and of facilitating the orderly distribution of agricultural commodities. Title 15 U.S.C.A., Section 714. It was granted the specific powers, by Congress, to support the prices of agricultural commodities through loans, purchases, payments, and other operations; to increase the domestic consumption of agricultural commodities by expanding or

[2]See Footnote 1 **ante.**

aiding in the expansion of domestic markets, or by developing new and additional markets and uses for such commodities; to export, or cause to be exported, or aid in the development of foreign markets for, agricultural commodities. Title 15 U.S.C.A., Section 714c. Having in mind these objectives and powers confided to it by Congress to carry out a vast national program in support of our agriculture, it is impossible to find, in a reading of the "press release" by the government to the public and to agricultural interests as to what the "program" would be, a binding contract with any individual who might thereafter enter into a separate and detailed written contract with the government, that the Commodity Credit Corporation would not subsequently modify any part of the program announced, except at the peril of paying damages of hundreds of thousands, or millions of dollars to anyone who dealt with the Commodity Credit Corporation as a seller, even though such a modification of program might not only be intelligent and beneficent, but absolutely necessary if the agency were to carry out the duties confided to it and imposed upon it by Congress. A reading of the "press release," in the light of the purposes and powers of the Commodity Credit Corporation, as set forth in the statute, does not disclose that the press release must be construed as a binding promise to Rosenberg that the program mentioned therein would not in the future be changed without peril to the government. But it is not necessary to place our determination on the ground that the government did not impliedly agree not to vary its program, as announced in the press release.

Rosenberg had offered to sell 10,000 tons of raisins to the government on September 19, 1947. It had no raisins on hand; and before it delivered any, the government, on October 1, asked for further bids on 31,000 more tons of raisins.

When the government asked for bids on 31,000 more tons, Rosenberg offered, on October 8, 1947, to sell the government another 10,000 tons of raisins in addition to the 10,000 tons it had already sold to it. On October 13, the government accepted Rosenberg's offer to the extent of 4,330 additional tons, which brought the aggregate that Rosenberg had sold to the government, up to that time, to 14,330 tons. None had been delivered.

On October 14, 1947, the government announced that it would purchase 60,000 more tons of raisins, in addition to the 61,000 tons theretofore purchased. Rosenberg then asked that the government cancel its contracts to sell the prior aggregate amount of 14,433 tons. The government refused to cancel. Where did Rosenberg stand then? It had purchased no raisins. It had delivered none. It wanted the government to let it out of the contracts. The government refused. Who was damaged? How much?

If Rosenberg was damaged by reason of the government's announced purchases on October 14, 1947, of 60,000 tons of raisins in addition to the first purchases of 61,000 tons, when was it damaged? If Rosenberg had refused to do anything further, when the government had refused to cancel its contract, on October 14, 1947, what damages would Rosenberg have suffered? Not a penny. It had not delivered any raisins. It had not bought any. It had no claim for damages, and it made no such claim. It only wanted to get out of the contracts. These were the only contracts of sale of the raisins between Rosenberg and the government. How, then, does Rosenberg build up its claim of damages against the government on these contracts to the sum of $329,437.53, which it now claims?

Rosenberg contends that the government caused the prices of raisins to rise in the market by buying more than

the original amount of 61,000 tons, which it had announced it would purchase in its press release of September 5, 1947. It further claims that, when the government, on November 26, 1947, required all packers who thereafter sold raisins, to certify that they had paid the growers not less than $135.00 per ton, it caused an abnormally high rise in the field prices of raisins, and resulted in damage to Rosenberg by reason of its being required to purchase the raisins at such higher prices in fulfillment of the government contracts.

In sum, according to Rosenberg's claim, the government had breached its contract by purchasing raisins in the open market, when it had agreed not to do so—and, further, by subsequently requiring packers, after November 26, 1947, to certify that they had paid growers not less than $135.00 a ton.

We may assume, for the argument, that Rosenberg is right in its contention as to the breach. Then the government was not entitled to delivery of the raisins from Rosenberg after the first breach of contract on October 14, 1947, nor after the second alleged breach on November 26, 1947, and Rosenberg would, accordingly, be discharged from any obligation under the contracts by reason of the government's breach. As has been remarked, at the time of the alleged breaches by the government, Rosenberg had suffered no damages, since it had bought no raisins, and had delivered none. It commenced to purchase raisins to fulfill the government contract only in the latter part of December, 1947. Yet, in spite of these facts, we find Rosenberg, more than three months after the breach by the government of the so-called implied contract, upon which it mainly relies in this case, asking the government to amend the contract by extending the time for delivery of the raisins. No raisins

had been delivered up to the latter part of December, 1947, and, certainly, no claim of damages could have been made up to that time. And no claim of damages was made by Rosenberg when it asked the government to amend the contract as late as January 22, 1948.

The circumstances leading up to Rosenberg's request for revision of the written contract are pertinent. On January 21, 1948, the government demanded that Rosenberg deliver the raisins under the terms of the contract. On January 22, 1948, Rosenberg replied to the government, stating that it had been unable to deliver the raisins "Because of our inability to secure the raisins, due to the confused situation in the San Joaquin Valley resulting in an almost total stoppage of movement of raisins into our Fresno plant, and because of our failure to secure any relief from Washington * * *. We are now in a position to make deliveries against this contract, and it is our understanding that before the Shipping and Storage Branch can instruct shipment against this contract, it will be necessary to issue an amendment reinstating this tonnage and extending the delivery date. We will appreciate it if you will furnish such an amendment." No mention was made of any breach up to this time.

On January 26, 1948, the government, in a telegram, emphasized Rosenberg's default in delivery and asked if it would deliver the raisins, provided no damages for nondelivery would be sought by the government, other than the waiver by Rosenberg of carrying charges. The government also stated: "We are willing to take delivery on all of the quantities covered by both the above mentioned contracts *at the contract prices.* * * * We will not pay carrying charges on any raisins * * *. This telegram is sent without prejudice to any rights of Commodity Credit Corporation. If this arrangement is agreeable to you please indicate your

agreement therewith by advising us not later than 500 PM January 28, 1948. Otherwise please indicate your intention as to your performing on these contracts." (Emphasis supplied) Here, the government was saving any rights it had against Rosenberg.

On January 28, Rosenberg responded by telegram, stating: "This Confirms Our Agreement to Extend Period for Shipment as Outlined Your Wire. Will Appreciate Receiving Prompt Shipping Instructions . . ." There was no mention here by Rosenberg of any claimed breach on the part of the government, or any reservation of a claim for damages.

The government thereafter issued shipping instructions and the raisins were delivered in February and March, 1948. Rosenberg thereafter proceeded to bill the government for the raisins delivered under the contracts, as amended, upon standard voucher forms, certified that the bills thus presented were correct and just and that "all conditions of purchase applicable to the transactions had been complied with." No reservations of a claim for damages, or breach of contract, were contained in the voucher forms; and Rosenberg accepted payment of the vouchers, based on the original contracts, at the prices originally agreed upon, as was required by the government when it consented to the amendment of the contract extending time for delivery and waiving any claim for damages on account of Rosenberg's nondelivery up to that time.

It is the general rule that one who is injured by the wrongful acts of another, whether as the result of a tort or of a breach of contract, is bound to exercise reasonable care and diligence to avoid loss or to minimize or lessen the resulting damage, and, to the extent that his damages are the result of his active and unreasonable enhancement

thereof, or due to this failure to exercise such care, he cannot recover. He is bound to protect himself if he can do so with reasonable exertion or at a trifling expense, and can recover from the delinquent party only such damages as he could not, with reasonable effort, have avoided. He must do nothing to aggravate his loss, but must do all he can to mitigate or reduce it. *Campfield v. Sauer*, 189 F. 576 (C.A. 6).

We do not consider that the government ever breached its contract with Rosenberg; but if it did, Rosenberg was not damaged at the time of the alleged breach in October, 1947, or in the following months of November or December, nor does it claim that it was damaged at that time. It would have been damaged in no way by the claimed breach if it had simply refused to deliver under the contract. Where there has been a breach of contract in a contract of sale, and nothing has been yet done by the seller under the contract, the proper course for the seller is to refrain from doing anything, unless such course, in itself, would enhance the damages which the seller would suffer. And where the seller refrains from doing anything after the breach, the measure of his damages will be only the profit he would have derived had the contract been carried out. Williston on Sales, Section 1299. It is held that where a party is entitled to the benefit of a contract and can save himself from a loss arising from a breach of it at a trifling expense or with reasonable exertions, it is his duty to do it; and he can charge the delinquent with such damages only as, with reasonable endeavors and expense, he could not prevent. *Warren v. Stoddart*, 105 U.S. 224, 229. A party injured by a breach of contract has no right to perform, if by so doing, damages will be enhanced. It is the duty of the injured party to minimize rather than increase them. A plaintiff cannot hold a defendant liable for damages which need not have been incurred.

If a man engages to have work done, and afterward repudiates his contract before the work has been begun, it is inflicting damage on the defendant without benefit to the plaintiff to allow the latter to insist on proceeding with the contract. The plaintiff must so far as he can, without loss to himself, mitigate the damages caused by the defendant's wrongful act. *Spanish American Line, Inc. v. Baugh Chemical Co.*, 47 F.2d 261 (D.C. Md.). See also Williston on Contracts, Section 1298.

Even in cases where a party has been fraudulently induced to make either a contract of sale or purchase, it follows that if, after full knowledge of the fraud or deceit, he goes forward and executes it notwithstanding such fraud, the damage which he thereby sustains is voluntarily incurred. The maxim *volenti non fit injuria* has application to all loss resulting from the voluntary execution of a non-obligatory contract with full knowledge of the facts which render it voidable. Fraud without damage is not actionable. If the fraud be discovered while the contract is wholly executory, the party defrauded has the option of going on with it or not, as he chooses. If he executes it, and the loss happens from such voluntary execution, he cannot recover damages which he deliberately elected to incur. The execution of the contract, so far as it was executory after full knowledge of the fraud, is equivalent to an adoption of the contract with full knowledge of the facts. *Simon v. Goodyear Metallic Rubber Shoe Co.*, 105 F. 573 (C.C.A. 6). A party to an executory contract procured by false representations who, after knowledge that the representations are false and fraudulent, performs, or, without necessity, completes performance of the contract, and accepts payment according to its terms, thereby waives the fraud. *The Baltimore & Ohio Railroad Co. v. Jolly Bros. & Co.*, 71 Ohio St. 92, 72 N.E. 888.

The Uniform Sales Act provides, in Section 64(4), as follows: "If, while labor or expense of material amount are necessary on the part of the seller to enable him to fulfill his obligation under the contract to sell or the sale, the buyer repudiates the contract or the sale, or notifies the seller to proceed no further therewith, the buyer shall be liable to the seller for no greater damages than the seller would have suffered if he did nothing towards carrying out the contract or the sale after receiving notice of the buyer's repudiation or countermand."

The basis of the rule in the above clause is not the fact that the contract is, in the contemplation of the parties, one for the manufacture of goods, but the general obligation must rest upon a party, whose rights have been invaded, to take such a course as is reasonably likely to minimize the damage which he will suffer; and the rule is not confined to cases where there is an anticipatory breach by way of a repudiation of a contract, but applies also where the breach of contract is based upon the buyer's failure to give orders for further deliveries as contemplated by the contract. *Zimmerman Radio Corp. v. Bronson & T. Co.*, 108 Conn. 632, 144 A. 301.

Moreover, a breach of contract caused by a buyer's insistence on more expensive materials in making articles than was contemplated between the parties, is equivalent to a repudiation of the contract, or notification to the seller not to proceed, in so far as it bears upon the rights of the seller. *Capitol Paper Box Inc. v. Belding Hosiery Mills, Inc.*, 350 Ill. App. 68, 111 N.E. 2d 858. Where damages are claimed, not for the direct injury, that is, the loss of the value of the contract itself, but for consequential loss, as in the instant case, the plaintiff cannot recover for such loss, if he might reasonably have avoided it. *Bear Cat Mining Co. v. Grasselli Chemical Co.*, 247 F. 286 (C.C.A. 8).

It follows, from the foregoing, that where there has been a breach of contract, a party does not have the right to take action which serves only to cause damage to the other party. In the instant case, if there was a breach of contract, it justified non-performance by Rosenberg; but, if there was such a breach, it was not the breach that created the damages, but, rather, Rosenberg's action in performing the contract; and it cannot pile up damages against the government by such conduct.

Here, Rosenberg, in order to save itself from loss, according to its own claim, was not obliged to make any exertion or indulge in any expense whatever. It had purchased no raisins and delivered none for months after the claimed breach by the government. The contract, at the time of the breach and for months afterward, was wholly executory. In executory contracts covering a period in the future, it is the duty of a party whose contract has been broken to take reasonable steps to minimize his damages. *Kessler v. Jefferson Storage Corp.*, 125 F.2d 108 (C.C.A. 6). Rosenberg claimed that it commenced the delivery of raisins, three months after the alleged breach, at the contract prices, by purchasing them at such high prices that it suffered a loss of $329,437.53. Accepting its contention as to the damages it suffered—which is most questionable, in our view—it follows that Rosenberg deliberately enhanced the loss instead of using reasonable care and diligence to avoid or lessen it; and, accordingly, it cannot recover.

In addition, after the alleged breach, or breaches, had occurred, Rosenberg performed the contract and accepted the prices stipulated therein. In *Francis v. United States*, 96 U.S. 354, 360, where a dispute arose between a contractor for the delivery of a commodity and government officials as to how the contract was to be carried out, and although the

contractor would legally have been able to recover the extra expense caused him by improper interference on the part of such officials, nevertheless, when the contractor delivered the commodity under the contract, collected and received the contract price, and gave receipts in full as for a transaction completed pursuant to the contract, it was held that such actions proved an accord and satisfaction and he could not recover for the extra expense. See also *Willard, Sutherland & Co. v. United States*, 262 U.S. 489.

There was, in fact, no disputed claim on Rosenberg's part, which was advanced by it or recognized by the government, when Rosenberg performed the contracts. It had previously, in October, 1947, asked the government to let it out of its contracts. But the government refused. In January, 1948, the government called upon Rosenberg to perform, after it had long been in default. When the contract was reinstated, at Rosenberg's request, with an extension of time for delivery, the government, in writing, required delivery at the contract price, and agreed that if such delivery was made, it would waive any claim for damages for nondelivery. It is true that Rosenberg, through its official in charge, proposed that the reinstatement of the contracts contain a provision reserving to Rosenberg the right to assert a claim against the government. But, before delivery of the raisins under the contract, the government rejected such proposal. Rosenberg thereafter performed the contract, delivering the raisins during the next two months at the contract prices, and billed the government upon standard voucher forms, certifying that the bills presented were correct and just and that all conditions applicable to the transaction had been complied with. No reservations of any kind were contained in the voucher forms; and Rosenberg accepted payment of such vouchers, at the contract prices.

Where a party, following a dispute as to the price due, performs the contract and accepts the stipulated price, it cannot then claim damages for a breach of contract. *Early & Daniel Co. v. United States*, 271 U.S. 140.

In consideration of the foregoing, the judgment of the district court is reversed, and the complaint, dismissed.

DENMAN, CHIEF JUDGE, Concurring in the result:

The determining question in this case is whether Rosenberg Bros., in fixing the amounts of its bids to sell to the Commodity Credit Corporation raisins which it did not then have, can rely on that Corporation's statement on September 5, 1947, that it intended to purchase "a maximum of . . . 61,000 tons of [Thompson seedless] raisins" conditioned by the following, "if the purchase of this total quantity . . . is necessary to provide outlets for the relatively large 1947 production."

If such a statement had been made by a private corporation having a wide market control, it well could be argued that having made bids a dealer like Rosenberg Bros. could hold the corporation liable if, after accepting a bid it then proceeded so to increase its purchases that the costs of the raisins to Rosenberg were thereby increased. In such a situation, Rosenberg might be entitled to recover damages based upon the cost to it of the raisins if the 61,000 ton representation had been complied with.

However, the Commodity Credit Corporation is not such an ordinary buyer. It is a government institution whose duty with respect to the Thompson seedless raisin industry is stated by Congress in the Act creating it to be that of "stabilizing, supporting, and protecting farm income and prices, of assisting in the maintenance of balanced and adequate supplies of agricultural commodities . . . and of

facilitating the orderly distribution"[1] thereof. It seems clear that the policy announced by Congress in this statute requires that the Corporation be free at all times to adjust and readjust its operations to changing conditions in order to achieve its objectives. Rosenberg is, of course, charged with knowledge of the governmental purpose of the Commodity Credit Corporation.

Here it is unquestioned that the statement of the anticipated limit of raisin purchases was made sometime before the harvesting had begun of the grapes to be later cured as raisins. It is obvious that the total quantity of raisins ultimately to be produced from the Thompson seedless grapes might differ from the amount on which the statement of September 5th was based. Likewise the foreign and domestic demand for such raisins against the competition of other dried fruits and confections might be so much less than expected as to require the purchase by the government of an even greater amount than that stated on September 5th, in which event it would be the duty of the governmental corporation to increase its purchases thereby "supporting and protecting farm income and prices". That is to say, the maximum quantity of Thompson seedless raisins to be purchased specified in the September 5th announcement well might prove to be insufficient and require eventual enlargement. So also the production may have been less or the foreign and domestic demand greater, requiring government purchase of a lesser amount than 61,000 tons.

All the above must be deemed obvious to a bidder offering to sell raisins under the request for bids later made by the Corporation, and hence such bidder must be deemed to have accepted the chance of lesser profit or loss by a decrease or

[1]Title 15, U.S.C., Section 714.

a larger profit by an increase of the amount of Thompson raisins available for purchase.

It well may be that the action of the Corporation would warrant the unilateral rescission of the contracts of sale. That question, however, is not before us because instead of rescinding, Rosenberg Bros. proceeded to perform the contract and is not entitled to recover on the basis of the increased cost of the raisins, having entered, as stated, into the contracts charged with the knowledge of the obligation of the Corporation to increase or decrease its purchases should conditions so require.

(Endorsed:) Opinion and Concurring Opinion. Filed Mar. 7, 1957.

Paul P. O'Brien, Clerk.

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OCT 2 1957
JOHN T. FEY, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 357

ROSENBERG BROS. & CO., INC., a corporation,
Petitioner,

vs.

COMMODITY CREDIT CORPORATION,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit
Supplemental Brief of Petitioner

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To the Honorable Earl C. Warren, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the United States:

The Brief for the respondent in Opposition raises certain points and characterizes certain legal principles in a manner which requires further comment from the Petitioner. It is the purpose of this Supplemental Brief to make such comment. This brief is filed in accordance with the provisions of Paragraph 4 of Rule 24 of the Supreme Court of the United States.

ARGUMENT

1. Respondent's Argument Emphasizes the Importance of the Question of Federal Law Which Should Be Settled by the Supreme Court.

Respondent's first argument (Brief, p. 8) characterizes the change in CCC's raisin purchase program as normally within the scope of the risks assumed by the Petitioner, implying that a government agency such as CCC "normally" has the right to interfere with performance of the parties with whom it contracts unless there is an affirmative showing that CCC has agreed to limit its activities. As has been pointed out in the Petition (p. 10) a contract not to hinder or prevent performance is "nearly always" implied, and it is "assumption of risk" by the other contracting party which must be affirmatively shown.

Respondent attempts to support its position by reference to *Title 15 USCA Section 714c* which grants CCC the power to support prices of agricultural commodities. Respondent characterizes this power as a "duty". It should be noted that raisins are a "non-basic commodity"; that the statute does not require CCC to support prices of non-basic commodities but only gives it discretion to do so; that under the terms of the statute, and of its Charter, CCC is also a purchasing agent of the United States. The nature of CCC's activities in the subject case emphasizes that it was acting principally in its role as a purchasing agent in connection with its 1947 raisin program. Speeches of the Secretary of Agriculture and of CCC officials, which preceded the call for bids, as well as the September 5 announcement, indicate the limited nature of the program and the aim of CCC to purchase only so many raisins as could be disposed of in designated outlets. Docket 0C-95a (Plaintiff's Exhibit 5) confirms this purpose. Contracts were made on the basis of

competitive bidding which produced low prices. CCC officials expressed themselves as delighted with the low prices obtained and refused to release packers from their contracts. Such "delight" and refusal to grant relief are certainly attributes of commercial purchase rather than of price support.

Respondent argues that the tentative nature of the statements contained in the September 5 announcement of the Secretary of Agriculture should have warned Rosenberg of the possibility of change (Respondent's Brief p. 11). Every statement to which Respondent refers indicates that CCC might purchase *less* than the maximum announced. None of the statements indicate that CCC would, in any event, *exceed* the announced maximum of 61,000 tons, or that CCC would enter into competition with packers to acquire raisins from growers or that CCC would support prices at any given level. The language of the announcement in these particulars is definite and unequivocal.

CCC's reliance on mere estimates of the raisin crop and of the raisin surplus do not support Respondent's argument that Rosenberg assumed the risk of change because of the tentative nature of the program. The estimates were carefully prepared and amazingly accurate. The original estimate of the surplus was 100,000 tons and CCC's announced program was to take only 61,000 tons of this surplus. The change in CCC's program was not the result of a change in surplus estimates. The surplus in actuality departed very little from the estimates. The expanded CCC purchase program aimed to acquire 121,000 tons, a figure actually in excess of the indicated surplus, whereas its original program indicated that a surplus of almost 40,000 tons would be left overhanging the market.

2. Respondent's Contentions Do Not Affect Petitioner's Argument That the Decision of the Court of Appeals Has Departed from the Decisions of the Other Circuits and from the Usual Course of Judicial Proceedings.

(a) MITIGATION OF DAMAGES.

Respondent argues that had Rosenberg stopped performance after CCC's purchase, it would have incurred no damage because it expected no profit on its CCC contracts. The principle of mitigation of damages on which Respondent relies is discussed in the commentary accompanying Section 336 of the Restatement of Contracts (cited by Respondent, Brief p. 13). Comment a indicates that an innocent contracting party need not incur unreasonable inconvenience or expense or disorganize his business in order to mitigate damages after a breach of contract. The innocent party should act only as a prudent man would. Respondent overlooks the fact that the large tonnage represented by Rosenberg's CCC contracts bore its share of Rosenberg's plant and overhead costs, and that the failure of Rosenberg to participate in CCC's program would have shifted all these costs to its commercial sales. It would have meant loss of grower confidence and contracts because of Rosenberg's inability to dispose of its growers' production, and this, in the long run, would have seriously interfered with Rosenberg's source of supply. It is also obvious that the failure of Rosenberg and of the nine other packers, which were in a similar position, to participate in CCC's program would have wrecked the program and brought disaster to the industry. When faced with these consequences, no prudent man could stop performance as Respondent suggests Rosenberg should have done.

In its discussion of the issue of mitigation of damages, Respondent ignores the established distinction between those cases where the party breaching a contract repudiates

the contract and those cases in which the defaulting party continues to insist on performance. None of the authorities cited by Respondent deal with the latter situation. *Warren v. Stoddart*, 105 U.S. 224, involves repudiation by the defaulting party. *Simon v. Good Year Metallic Rubber Shoe Co.* 105 F.2d 573 (C.A. 6) is not concerned with breach of contract, but is based on deceit and misrepresentation. *Board of Trustees v. O. D. Wilson Co.* 133 F.2d 399 (C.A. D.C.) does not involve breach of contract but deals with the unilateral mistake of a bidder in omitting an item from his bid, followed by performance.

Williston recognizes the distinction between a defaulting party who repudiates his contract and one who continues to insist on performance. He states:

> "The situation must not be confused with one where there has been a material breach of contract which does not, however, indicate any intention to renounce or repudiate the remainder of the contract. In such a case the injured party has a genuine election offered him of continuing performance or of ceasing to perform and any action indicating an intention to continue will operate as a conclusive choice, *not, indeed, depriving him of a right of action for the breach which has already taken place*, but depriving him of any excuse for ceasing performance on his own part. • • • but where the contract is totally renounced there can be no election between continuation and cessation of performance." 5 Williston Contracts (Rev. Ed.) § 1334, p. 3749. (Emphasis added.)

Bu-Vi-Bar Petroleum Corp. v. Krow, 40 F.2d 488 (C.C.A. 10, 1930) does not, as Respondent claims (Brief p. 14), support Respondent's position, but is good authority for the proposition for which it was cited by Petitioner. On its facts, it is a repudiation case which holds that the innocent party may accept repudiation by the defaulting party to a contract

at any time before the repudiation is withdrawn. At page 492 of its opinion, the Court distinguishes cases such as the instant one stating:

> "The situation of the injured party where there has been a breach which does not indicate an intention to repudiate the remainder of the contract, and the situation of the injured party, where there has been a total renunciation of the contract, differs in important particulars. In the former case, the injured party has a genuine election either of continuing performance or ceasing to perform. * * * On the other hand, where the contract is wholly renounced there can be no real election between continuation and cessation of performance * * * because, after notice of renunciation the other party cannot go on and complete an executory contract and sue for any increased damages resulting from his continuing to perform".

(b) FAILURE TO FOLLOW FINDINGS.

Respondent attempts to explain the way in which the Court of Appeals disregarded the findings of the trial court by pointing out that under Rule 52(a) of the Federal Rules of Civil Procedure the trial judge's findings are conclusive only if not "clearly erroneous." In the instant case, the Court of Appeals simply ignored the findings of the District Court without comment. At no place in its opinion is there any statement which indicates that findings of the trial court were clearly erroneous. In view of the evidence in the record, it could not make such a finding.

3. The Decision of the Court of Appeals on the Question of Waiver Not Only Ignores the Findings of the Trial Court, but Is in Conflict with Another Decision in the Same Circuit.

Respondent's discussion of *United States v. Lundstrom* (D. Ore. 1941) 53 Fed. Supp. 709, *aff'd* (C.C.A. 9, 1943) 139 F.2d 792 (Respondent's Brief p. 14, footnote) is con-

fined to the Court of Appeals' opinion. The Petition refers to the District Court opinion, which is directly in point. Vouchers stating that payments received were "correct and just" were signed by the claimant as a condition of receiving progress payments, including a final payment, for moving lumber. The District Court stated that neither signing the vouchers nor acceptance of payment waived plaintiff's claim for damages for the additional expense occasioned by a variance in the nature of the materials hauled, distinguishing waiver of a "condition of a contract" from waiver of a "claim for damages". (53 Fed. Supp. at 711). Although the Court of Appeals, as Respondent states, did find that the defense of accord and satisfaction had not been properly presented by the Government, it also stated that the essentials of accord and satisfaction were not present (139 F.2d at 795), to that extent approving the District Court opinion.

The other authorities which Respondent cites on page 14 of its brief were either cases in which the claimant made deliveries in the absence of a contract or in excess of contract quantities, at a price stipulated as a condition of delivery, or cases where the Court found a waiver as a matter of fact. In the instant case, the District Court found as a matter of fact that there was no waiver. Moreover, the evidence shows that the contracting officer of CCC with whom Rosenberg made arrangements for delivery lacked authority to deal with price or to compromise Rosenberg's claim, and sought only to make arrangements for delivery and to effect a minor waiver of carrying charges and a minor adjustment for packaging (Record, pp. 617-618).

CONCLUSION

Respondent's Brief in Opposition fails to overcome the arguments advanced in the Petition for Certiorari. It is

respectfully submitted that each of the grounds stated in the Petition is valid, and that Certiorari should be granted so that the decision of the United States Court of Appeals for the Ninth Circuit may be reviewed and corrected by this Honorable Court.

Dated at San Francisco, California this 30th day of September, 1957.

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 357

ROSENBERG BROS. & CO., INC., A CORPORATION,
PETITIONER

v.

COMMODITY CREDIT CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of California, Southern Division (R. 51–66) is reported at 128 F. Supp. 764. The opinion of the United States Court of Appeals for the Ninth Circuit (Pet. App. 1–20) is reported at 243 F. 2d 504.

JURISDICTION

The judgment of the Court of Appeals was entered on March 7, 1957 (R. 701). A petition for rehearing, timely filed, was denied on May 13, 1957 (R. 702). The petition for a writ of certiorari was filed on August 9, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

QUESTIONS PRESENTED

1. Whether the action of Commodity Credit Corporation in modifying the price support program for raisins as announced by it in a press release was a breach of an implied promise not to hinder petitioner's performance of contracts to deliver raisins to it.

2. If there was a breach of contract, whether petitioner failed to mitigate damages.

3. Whether petitioner waived any claim to damages for breach of contract by delivering raisins after the contracts had been reinstated upon the express understanding that delivery would be at the contract prices and by accepting payment at the contract prices without reservation of the claim now asserted.

STATEMENT

In August 1947, the Department of Agriculture adopted a docket styled *Dried Fruit Price Support Program,* OC–95A, which was amended from time to time (Plaintiff's Exhibit 5). This docket, as first adopted, provided for a total purchase of 133,000 tons of dried fruit including 36,000 tons of raisins plus a contingent purchase of an additional 25,000 tons of raisins. The maximum amount of 133,000 tons was inserted in the docket for the purpose of placing a limit upon the contractual authority of the Government's contracting officials (R. 458–459). On September 5, 1947, the Secretary of Agriculture, with reference to this progam, issued a press release in Albuquerque, New Mexico, which stated that the Commodity Credit Corporation (hereinafter referred to as CCC) would purchase up to 133,000 tons of dried

fruit including 61,000 tons of raisins, and that the purchases would be made from processors and packers (Pet. App. 4).[1] On September 10, 1947, the Department of Agriculture, by Announcement No. 1, invited offers for the sale of 30,000 tons of raisins and various quantities of other dried fruits (R. 27–29). Rosenberg Bros. & Co., the predecessor in interest of the present petitioner (referred to as Rosenberg), submitted an offer on September 19, 1947, to sell

[1] The press release stated:

> Secretary of Agriculture Clinton P. Anderson announced that Commodity Credit Corporation will purchase up to 133,000 tons of dried apples, dried peaches, dried prunes and raisins if the purchase of this total quantity of dried fruits is necessary to provide outlets for the relatively large 1947 production. The purchases will assist the industry in disposing of this expected surplus of supply and provide an excellent food for foreign relief feeding and school lunches.
>
> The maximum limit of 133,000 tons is divided into purchase of 2,250 tons of dried apples, 3,750 tons of dried peaches, 61,000 tons of raisins, and 66,000 tons of dried prunes.
>
> Purchases of the dried fruits under the program will be made from processors and packers of dried fruits. An announcement will be issued soon inviting packers to submit offers on a portion of the quantity to be purchased.
>
> Most of the prunes procured by the Commodity Credit Corporation will be of the 70/80, 80/90, and 90/100 sizes. Raisin purchases will be confined to the Thompson Seedless variety.
>
> The purchase program does not provide price support at any given level, but is expected to result in reasonable prices to producers and consumers.
>
> Department officials stated that the program should enable the dried fruit industry to complete its plans for readjustment on a self-help basis. It was emphasized that Government purchases should not be regarded as the permanent solution of dried fruit surplus problems.

10,000 tons of raisins to CCC at prices ranging between $151.00 to $152.00 per ton, depending upon the containers used. This offer was accepted on or about September 23, 1947, and on the following day a standard Government contract was executed between Rosenberg and CCC, by the terms of which Rosenberg agreed to deliver to CCC upon demand and at the stated prices 10,000 tons of raisins in the period October 1–December 15, 1947 (Pet. App. 2).

On October 1, 1947, the Department of Agriculture issued Announcement No. 2 which invited bids for dried fruit including 31,000 tons of raisins (R. 36–37). On October 8, 1947, Rosenberg in response to this Announcement offered to sell 10,000 tons of raisins (Pet. App. 2). On October 9, 1947, the docket was amended (Amendment No. 1), and provision made for increasing the maximum quantity of raisins to be purchased to 121,000 tons (R. 75). The record is not clear as to when the Secretary of Agriculture approved the amendment but it appears to have been several days later (R. 120–122).

On October 13, 1947, CCC accepted Rosenberg's offer of October 8 to the extent of 4,330 tons priced at $149.40 per ton, and on that date a formal contract was executed (Pet. App. 2). On October 14, the Department of Agriculture publicly announced Amendment No. 1 stating that offers would be made to purchase an additional 60,000 tons of raisins (R. 17–18). Rosenberg promptly requested cancellation of its contracts following this public announcement, but this request was denied (R. 222–224, 241–242, 253). On October 17, 1947, CCC further amended its raisin

purchasing program by authorizing purchase of raisins from growers or processors (R. 76). On November 26, 1947, the program was further modified by requiring all packers *thereafter* selling Thompson seedless raisins to CCC to certify that they had paid the grower not less than $135.00 per ton (R. 44).

Rosenberg at the time of executing its contracts had not purchased and did not have available raisins to fill the Government contracts. It was selling short in the hope that raisins would drop in price sufficiently to enable it to fulfill the Government contracts without loss (Pet. App. 3). However, the growers were in continuous resistance to the lower prices offered by the packers and only 800 tons were purchased by Rosenberg in the period September 1–November 3, 1947 (Pet. App. 3). After that date raisins were sold in substantial quantities at prices ranging from $127.00 to $142.00 (Pet. App. 3). Since Rosenberg's normal processing and packing cost was $40.00 per ton, it was impossible for Rosenberg to purchase raisins at these prices without suffering a substantial loss on its Government contracts. Although CCC continuously demanded raisins under the contracts, Rosenberg consistently refused to deliver, stating that it had no raisins available (Pet. App. 3; R. 301–302, 317–319). In January 1948, the price dropped sharply and raisins were being sold in that month at prices ranging from $100.00 to $125.00 (Pet. App. 3). By that time CCC was out of the market (R. 388–389), Rosenberg's commercial sales were almost complete, and Rosenberg had more than enough raisins on hand to fill its remaining commercial com-

mitments (R. 338). Rosenberg therefore decided to make delivery to the Government (R. 338).

On January 22, 1948, Rosenberg requested shipping instructions and an amendment to the contract reinstating the tonnage and extending the delivery dates (R. 263–264). The contracting officer agreed to furnish an amendment reinstating the tonnage and extending the delivery dates, and agreed further that no damages for non-delivery would be claimed by CCC provided Rosenberg agreed to waive all carrying charges (R. 268–269). The contracting officer stated that CCC was willing to take delivery at the contract prices, and further stated that the prices would not be raised except with respect to a minor adjustment which related to the type of containers involved. *Id.* Rosenberg inquired as to whether it could make delivery without prejudice to a claim for additional compensation and was advised that any counter-offer or qualification would require a review by the officials in Washington, and that pending such review, shipping instructions would necessarily have to be issued to other packers (R. 269–270, 609–610). The contracting officer also stated that, if Rosenberg would agree to make immediate delivery, shipping instructions would be issued at once, but that CCC could not agree to anything that could be interpreted as recognizing a claim by Rosenberg (R. 610). On January 28, Rosenberg agreed to make delivery, and delivery was made in the period February-March, 1948 (Pet. App. 12).

Vouchers were submitted by Rosenberg at the contract prices without any reservations of its asserted claim for damages and Rosenberg was paid on that basis (Pet. App. 12; R. 635–636). Rosenberg thereafter filed a claim which was denied and this suit was instituted (R. 3).

The District Court ruled in Rosenberg's favor, holding that the revised program was in violation of an implied agreement not to increase Rosenberg's cost of performance (R. 58). The court further ruled that the acts in question were proprietary and not sovereign, and that there was no evidence establishing the existence of a waiver by Rosenberg of the alleged breach (R. 60). The District Court also found that Rosenberg would have purchased raisins at $110 per ton had the Government adhered to the purchase program first announced, and awarded damages in the total amount of $160,366.88 (R. 65).

The Court of Appeals reversed and dismissed the complaint (Pet. App. 18), holding that recovery was barred on three grounds. First, the CCC had not breached its contract by modifying the raisin price support program. Second, even if CCC had breached its contract with Rosenberg, Rosenberg's loss resulted not from such breach but from Rosenberg's action in performing the contract in disregard of its obligation to use reasonable care to minimize damages. Finally, the court held that Rosenberg waived any claim to damages by delivering raisins after the contracts had

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been reinstated by CCC at Rosenberg's request upon the express understanding that delivery would be at the contract prices and accepting payment, at the contract prices, without reservation of the claim now asserted.

ARGUMENT

The decision of the court below rests upon the application of settled principles of contract law to the particular facts of this case, and recovery was correctly denied on three separate and wholly independent grounds. There is no conflict of decisions. Further review by this Court, accordingly, is not warranted.

1. Petitioner contends that by modifying the raisin purchasing program, as announced in the press release of September 5, CCC violated an implied promise not to make performance more difficult. While it is true as a general rule that, by entering into a contract, the contracting parties impliedly promised not to hinder or prevent performance by the other, this rule does not limit the normal activities of the parties unless the evidence reasonably leads to a conclusion that the defendant had agreed so to limit his activities. *United States* v. *Fidelity & Deposit Co. of Maryland*, 152 Fed. 596 (C. A. 2); *Megan* v. *Updike Grain Corp.*, 94 F. 2d 551 (C. A. 8), certiorari dismissed per stipulation, 305 U. S. 663; *Standard Accident Ins. Co.* v. *United States*, 59 F. Supp. 407 (C. Cls.), certiorari denied, 325 U. S. 870; 1 Restatement, *Contracts*, § 315; 4 Corbin, *Contracts*, § 947; 5 Williston, *Contracts* (Rev. ed.), § 1293–A.

The lack of an implied promise here becomes clear when the press release on which Rosenberg relies is read in light of the purposes of CCC and of the raisin program announced in the release. As the court below noted, CCC "was created by Congress for the purposes, among others, of stabilizing and protecting farm income and prices; of assisting in the maintenance of balanced and adequate supplies of agricultural commodities; and of facilitating the orderly distribution of agricultural commodities. Title 15 U. S. C. A., Section 714. It was granted the specific powers, by Congress, to support the prices of agricultural commodities through loans, purchases, payments, and other operations; to increase the domestic consumption of agricultural commodities by expanding or aiding in the expansion of domestic markets, or by developing new and additional markets and uses for such commodities * * * Title 15 U. S. C. A., Section 714c." (Pet. App. 7–8.)

It was in discharge of these functions and duties, imposed upon it by the statute, that in the summer of 1947, the Department of Agriculture, as an incident of its continuing study of agriculture and under the added stimulus of inquiries and requests from growers and others, began to consider what action, if any, it should take to assist the raisin industry to dispose of the anticipated surplus. It was expected by the Department that the packers would approach the 1947 marketing season on a cautious basis since the price for packaged raisins had declined from 22 cents per pound (November 1946) to 11 cents per pound (July 1947) (R. 476). At that time, the Department con-

cluded, tentatively, that a substantial surplus of 1947 crop raisins was to be expected on the basis of current production and marketing expectations. Such an estimate at that time in the crop year involved considerable uncertainty, however, in that it required an estimate of what the total grape crop and the various effective demands would be. The tentative estimate was that the surplus might be as high as 100,000 tons or even more (R. 482) out of a total estimated crop of 325,000 tons (R. 157). Experience had shown that such an advance prediction might differ considerably from the actual production and surplus which later developed (R. 482–483). Nevertheless, recognizing that serious consequences would follow if the market were left without Government support, CCC undertook the program announced in the press release.

The explicit objective of the program as stated in the press release was to achieve prices which would be fair to both producer and consumer, *supra*, p. 3, fn. 1. While the press release stated that CCC intended to purchase up to 61,000 tons of raisins, this statement was made sometime before the harvesting had begun of the grapes to be later cured as raisins. Necessarily then, in formulating the plan announced, the CCC had to rely on estimates of the raisin crop and of the requirements of the domestic and foreign markets. There was no way of knowing whether the plan initially formulated would bring stabilized and fair prices. However, if the market did not respond as anticipated it would obviously be the duty of the CCC under the statute to revise its plan to meet the exigencies of the times.

All these considerations, which strongly negate any implied promise not to change the program, were well known to petitioner before it submitted its bid in response to the specific invitations for bids. Petitioner nevertheless insists that it could not have assumed the risk that changes in the program might be made because the press release was "clear and unequivocal" and because CCC officials rejected any change in the program "as announced" (Pet. 11). Contrary to these assertions, a reading of the press release, *supra*, p. 3, will demonstrate not only that it contains no statement that CCC would not, if necessary, modify its program but also that it indicated the tentative nature of the program in several ways. The release stated CCC would purchase *up to* 133,000 tons of dried fruit "*if* the purchase of this total quantity * * * [was] necessary to provide outlets for the relatively large 1947 production." (Emphasis added.) The release also said that an announcement would soon be made inviting packers to bid on a *portion* of the quantity. Moreover, prior to bidding, petitioner had made unsuccessful efforts to have the price support program modified and it knew that the growers were also making intensive efforts to secure a change. However, concluding that the growers would also fail and that the Government would not provide further price support, petitioner deliberately assumed the risk that the price of raisins would therefore decline sharply by selling 14,000 tons while in a short position. The fact that CCC, contrary to petitioner's expectation, did thereafter amend the original program does not

operate to convert petitioner's prediction into an implied promise by CCC.

2. Even assuming that CCC, by changing the raisin program, breached an implied promise to petitioner, the court below properly held that the settled principles requiring mitigation of damages barred recovery, for, as the court held, petitioner would not have incurred any loss if it had simply refused to deliver under the contracts. The contracts which were executed on September 24 and October 13, 1947, provided for delivery from October 1947 through January 1948. If there was any breach of contract by CCC, this must have occurred on October 14, October 17 and November 26, when the changes in the program were announced. Although CCC made its first call for delivery of raisins on October 16 and frequently thereafter, Rosenberg, having sold the raisins short, made no effort to fulfill its Government contracts during this time when the market prices for raisins were rising. Indeed, Rosenberg advised CCC that it did not have raisins available and consistently refused to furnish raisins in the period from October through December, *supra*, p. 5. During that entire period, Rosenberg purchased raisins for its commercial customers only and the District Court found that no purchases for the Government contracts were made prior to the latter part of December (R. 63–64). Rosenberg asserted that it did not anticipate making any profits on these contracts (R. 196, 209–210, 218); hence, it suffered no damages thereunder as long as they remained entirely executory and would have suffered no damage at all if it had rescinded the con-

tracts, as it believed it had a right to do (R. 294–295, 338). However, instead of rescinding without incurring damage, Rosenberg undertook to perform the contracts and solely by this action suffered the alleged loss which it seeks to recover in this proceeding. In such circumstances, the requirement of mitigation of damage formulated by this Court in *Warren* v. *Stoddart*, 105 U. S. 224 at 229, is fully applicable:

> The rule is that where a party is entitled to the benefit of a contract, and can save himself from a loss arising from a breach of it at a trifling expense or with reasonable exertions, it is his duty to do it, and he can charge the delinquent with such damages only as with reasonable endeavors and expense he could not prevent.

See also, *Simon* v. *Goodyear Metallic Rubber Shoe Co.*, 105 Fed. 573 (C. A. 6); *Board of Trustees* v. *O. D. Wilson Co.*, 133 F. 2d 399 (C. A. D. C.); see, 1 Restatement, *Contracts*, § 336; 5 Williston, *Contracts* (Rev. ed.), § 1298.

Rosenberg contends that this principle of mitigation is inapplicable here because, as the party against whom the breach was committed, it had an election to rescind, to sue for damages for the breach at once, or to continue performance and then sue for damages. But this choice must be made consistent with the requirement that losses be minimized. Indeed, as Professor Williston points out (5 Williston, *Contracts* (Rev. ed.), §§ 1298, 1337), this choice is but a particular application of the general rule of damages that an injured party may not needlessly increase the

liability of the wrongdoer, a rule which, far from being belied, is supported by the cases cited by petitioner (Pet. 13–14). In *Bu-Vi-Bar Petroleum Corp.* v. *Krow*, 40 F. 2d 488 (C. A. 10), no added expenses had to be incurred by the injured party in order to remain in a position to perform after repudiation by the other side. Similarly, in *Winans* v. *Sierra Lumber Co.*, 66 Cal. 61, 4 Pac. 952, continued performance after breach by the injured party was held not a bar solely because it had not operated to increase the loss.

3. Finally, the Court of Appeals correctly ruled that Rosenberg had waived its claim, if any, for damages by delivering the raisins after the contracts had been reinstated by CCC upon the express understanding that delivery would be at the contract price and by accepting payment at the contract prices without any reservations of the claims it now seeks to assert. It is settled law that if a party, following a dispute as to the price due, performs the contract, and accepts the stipulated price, he cannot thereafter recover damages. *Early & Daniel Co.* v. *United States*, 271 U. S. 140; *Willard, Sutherland & Co.* v. *United States*, 262 U. S. 489; *Nelson Co.* v. *United States*, 261 U. S. 17; *Francis* v. *United States*, 96 U. S. 354; *Savage, Executrix* v. *United States*, 92 U. S. 382.

These principles apply here.[2] As stated, *supra*,

[2] While petitioner alleges a conflict in this regard, the cases cited are inapposite. In *Blair* v. *United States*, 147 F. 2d 840 (C. A. 8), the court held only that by accepting partial payments after a breach, a party does not waive his right to sue for damages thereafter. In *United States* v. *Lundstrom*, 139 F. 2d 792 (C. A. 9), it was contended that acceptance of

pp. 6–7, CCC's offer to accept the raisins at a later date was contingent upon delivery "at the contract prices" and the offer further stipulated that the "prices would not be raised" except in a minor particular relating to the type of container to be used. Moreover, the contracting officer rejected Rosenberg's proposal that the reinstatement of the contracts contain a reservation to Rosenberg of the right to assert a claim. Thereafter, following the reinstatement, Rosenberg delivered the raisins and billed the Government at the contract prices upon standard form vouchers in which he certified that the bills presented were correct and just. No reservations of any kind were contained on these voucher forms. It is clear therefore that Rosenberg accepted the offer to reinstate the contracts knowing that the contracting officer intended that the Government pay no more than the contract price. As the Court of Appeals held, this unquestionably constituted a waiver.[3]

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progress payments and the signing of vouchers stating that the payments were just and correct presented an accord and satisfaction which barred recovery. This question was not decided, however, because it had not been presented properly.

[3] Rosenberg advances as a ground for granting certiorari that the court below improperly failed to follow the findings of fact of the trial court (Pet. 14–16). But the Court of Appeals' disagreement with the trial court was in large measure on issues of law, *i. e.*, the legal conclusions to be drawn from the facts. Moreover, to the extent that the disagreement was on facts, Rule 52 (a) of the Federal Rules of Civil Procedure makes the trial judge's findings conclusive only if not clearly erroneous, and it is apparent from the opinion of the court below that it did not regard the District Court's findings as meeting that standard.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

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